# THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS

## Report and Commentary

JAMES BROWN SCOTT

CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE
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REPORT AND COMMENTARY

BY

JAMES BROWN SCOTT

Secretary of the Carnegie Endowment for International Peace
Technical Delegate of the United States to the Second Hague Conference, 1907
Technical Delegate of the United States to the Conference at Paris, 1919

The usual remedies between nations, war and diplomacy, being precluded by the federal union [of the United States], it is necessary that a judicial remedy should supply their place. The Supreme Court of the Federation dispenses international law, and is the first great example of what is now one of the most prominent wants of civilized society, a real International Tribunal.—John Stuart Mill, *Considerations on Representative Government* (1861), pages 305-6.

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CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

WASHINGTON, D. C.

*September 17, 1920.*

To the Board of Trustees of the
Carnegie Endowment for International Peace:

Gentlemen:

On the 19th day of April, 1917, the Board of Trustees, at its annual meeting, pledged the Endowment to take such steps as lay in its power to aid in removing the obstacles still standing in the way of the establishment of a truly Permanent Court of International Justice. The resolution in this behalf was worded as follows:

> *Resolved,* That the Carnegie Endowment for International Peace shall make a special effort to overcome the remaining obstacles to the establishment of an International Court of Justice, and to this end the Executive Committee is authorized and directed to take such action and at such time as it may deem proper.

This resolution had, upon the motion of Mr. Andrew J. Montague, already been adopted by the Executive Committee at its meeting of January 4, 1917, and referred to the Board of Trustees for its approval.

At the annual meeting of the Board of Trustees on May 5, 1920, Mr. Elihu Root, President of the Endowment and Chairman of its Board of Trustees, stated that he had accepted membership in an Advisory Committee of Jurists invited by the Council of the League of Nations to prepare a plan for a Permanent Court of International Justice. Mr. Root requested that the undersigned be given a leave of absence to accompany him in an advisory capacity. This request met with the unanimous approval of the Trustees. The undersigned therefore accompanied Mr. Root, attended the meetings and, on occasion, participated in its proceedings.

In accordance with the practice of the Endowment, he presents the following report.

Respectfully submitted,

James Brown Scott,
*Secretary and Director of the*
*Division of International Law.*

# REPORT ON THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS

## Introduction

The Treaty of Versailles, signed June 28, 1919, whose ratifications were deposited at Paris on January 10, 1920, opens with the Covenant of the League of Nations, the Preamble of which reads as follows:

> The High Contracting Parties,
>
> In order to promote international coöperation and to achieve international peace and security
>
> by the acceptance of obligations not to resort to war,
>
> by the prescription of open, just and honorable relations between nations,
>
> by the firm establishment of the understandings of international law as the actual rule of conduct among governments, and
>
> by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another.
>
> Agree to this Covenant of the League of Nations.

One way of achieving international peace and security is declared to be "by the firm establishment of the understandings of international law as the actual rule of conduct among governments." To ascertain the "understandings of international law" and to make of them "the actual rule of conduct among governments," Article 14 of the Covenant provides that the Council of the League of Nations shall "formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice." By the same article the court is declared to "be competent to hear and determine any dispute of an international character which the parties thereto submit to it." In addition, the court may also give "an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

The court has therefore a double purpose and a two-fold jurisdiction: it is the judicial organ of the League of Nations competent "to hear and determine any dispute of an international character" which states may submit to it; it is also an adviser to the Council and the Assembly in the performance of their respective duties "upon any dispute or question" which either one or the other may refer to it.

To formulate plans for the establishment of this Permanent Court of International Justice, the Council, on February 13, 1920, invited the following jurists:

Mr. Satsuo Akidzuki, Former Ambassador of His Majesty the Emperor of Japan.
Mr. Rafael Altamira, Senator, Professor of the Faculty of Law of the University of Madrid.
Mr. Clovis Bevilaqua, Professor of the Faculty of Law of Pernambuco and Legal Adviser to the Ministry of Foreign Affairs of Brazil.
Baron Descamps, Belgian Minister of State.
Señor Luis Maria Drago, Former Minister for Foreign Affairs of the Argentine Republic.
Professor Carlo Fadda, Professor of Law at the University of Naples.
Mr. Henri Fromageot, Legal Adviser to the Ministry of Foreign Affairs at Paris.
Mr. G. W. W. Gram, Former Member of the Supreme Court of Norway.
Dr. B. C. J. Loder, Member of the Court of Cassation of the Netherlands.
Lord Phillimore, Member of the Privy Council of His Majesty the King of England.
Mr. Elihu Root, Former Secretary of State of the United States of America.
Mr. Milenko R. Vesnitch, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of the Serbs, Croats and Slovenes in Paris.

In the letter of invitation it was stated that "the duties which will fall to the court will cover a wide sphere, and will be of the very highest importance. The Council in no way underrates the sacrifice which it asks you to make in devoting a period of what will no doubt be arduous labor to helping to plan and create it; nor does it fail to realize that the work it is asking you to interrupt is itself of very great importance. But the court is a most essential part of the organization of the League of Nations. If it is established on sound and statesmanlike principles, it can contribute perhaps more than any other single institution to maintain the peace of the world and the supremacy of right amongst the nations."[1]

Mr. Akidzuki declined appointment and was replaced by Mr. Mineichiro Adatci, Japanese Minister to Belgium. The Brazilian Government was unable to spare Mr. Bevilaqua, who either hoped to attend the later sessions of the Committee, or wished a Brazilian to be on the Committee, inasmuch as he asked Mr. Raoul Fernandes, Brazilian member of the Reparations Commission established under the Treaty

[1] League of Nations, *Official Journal*, March, 1920, pp. 37-38.

of Versailles, to represent him. Later, upon the request of the Drafting Committee, the Secretary General was asked to have Mr. Fernandes, whose services were of marked value to the Advisory Committee, replace Mr. Bevilaqua. With this request the Secretary General complied, and Mr. Fernandes sat in the Committee with the right to vote from July 17th to the end of its sessions. Dr. Drago, who contributed so greatly to the success of the Second Hague Peace Conference and who sat as an arbitrator, the choice of Great Britain and the United States, in the North Atlantic Fisheries Cases, tried and decided at The Hague in 1910, was unable to attend because of ill health. Professor Fadda was superseded by Arturo Ricci-Busatti, Jurisconsult of the Italian Ministry for Foreign Affairs and Technical Delegate to the Peace Conference at Paris. Mr. Fromageot was detained in Paris on account of official business. Mr. André Weiss, Professor of Law in the University of Paris, and Jurisconsult of the Ministry for Foreign Affairs, designated in the place of Mr. Fromageot, was unable to attend and was succeeded at the last moment by Professor Albert de Lapradelle, Professor of International Law in the University of Paris and a Jurisconsult of the Ministry for Foreign Affairs. Mr. Gram declined to serve on account of ill health and was replaced by Mr. Francis Hagerup, Envoy and Minister to Sweden, formerly Prime Minister of Norway. Mr. Vesnitch was, unfortunately, unable to be present, inasmuch as his country had forced the premiership upon him in such terms and under such conditions that he could not refuse. His presence would have meant much to the Committee, as he had been a member of the Commission of the League of Nations appointed by the Paris Peace Conference, in which body he advocated the establishment of a Permanent Court of International Justice apparently before the other members of the Commission had seen or considered the necessity for such an institution.

The Committee, therefore, when it organized was thus composed:

Mr. Adatci.
Mr. Altamira.
Mr. Bevilaqua (represented by Mr. Fernandes).
Baron Descamps.
Mr. Hagerup.
Mr. de Lapradelle.
Dr. Loder.
Lord Phillimore.
Mr. Ricci-Busatti.
Mr. Root.

## Formal Opening of the Sessions of the Advisory Committee of Jurists, June 16, 1920

It was anticipated that the Committee should meet at London; but the Netherland Government, mindful of the "undying memories which cling around The Hague as the cradle of the beneficent work which had its beginning in 1899,"[2] desired that the jurists called upon to constitute a Permanent International Court of Justice should meet in that historic city to complete this phase of the work of the Second Peace Conference. Holland, therefore, invited the Committee to sit at The Hague, and placed at its disposal the Peace Palace, the gift of Andrew Carnegie, the actual home of the so-called Permanent Court of Arbitration of 1899. The invitation was accepted by the members of the Committee, and it met in the Peace Palace at The Hague on June 16, 1920.

His Excellency Mr. van Karnebeek, Minister for Foreign Affairs of the Netherlands, welcomed the Committee on behalf of the Queen and of the Government in an address which marshalled the past in the interest of the future.

Thus, after a word of greeting, he adroitly invoked the memories of the Hague Conferences and paid a tribute to their labors in the field of international justice:

The First Conference at The Hague, the work of which is often underrated, went as far as was practicable at the time and created at the beginning of the present century, on the proposal of the eminent British delegate, Lord Pauncefote of Preston, the ingenious machinery destined to facilitate and to encourage recourse to arbitration which was recognized by the Powers, at that time, as the most equitable means of adjusting disputes not capable of solution by diplomatic means. This was most ably explained by Baron Descamps in his report, more than 20 years ago. Since then there has been a decided impetus to the movement which tended to the introduction in international relations of a permanent court, with a purely judicial basis, and empowered to resolve by rules of law disputes which might arise between states. This movement, gaining new inspiration from a remarkable American initiative with which are associated the well-known names of Messrs. Elihu Root and James Brown Scott, whom we likewise have the honor to see amongst us, took form at the Second Hague Conference and would have ultimately been successful if it had been possible to reach agreement on the method of choosing judges and the constitution of the court. Later the fate met with by the Prize Court proved too strong

[2] Circular note of John Hay, Secretary of State of the United States, proposing a Second Conference at The Hague, October 21, 1904. *Foreign Relations of the United States* (1904), pp. 12-13.

for the efforts made by certain Powers in 1910 to complete the work which the Conference of 1907 had not finished.[3]

It was appropriate that the Council of the League of Nations, at whose request the Advisory Committee was assembled, should be represented on this occasion. It was personally appropriate that Mr. Léon Bourgeois should be its representative, for the organization of the states of the world into a Society of Nations, and the settlement by peaceable methods of the disputes certain to arise among the members, had been with him a matter of faith for years. It was especially appropriate that the first delegate of France to the First and Second Conferences of The Hague, and in each case the president of the Commission for arbitration and peaceful settlement of disputes, should wish success to the Committee whose members would continue and complete in one of its phases the labors of those two great and memorable conferences.

"It is fitting," he said, "that The Hague has been designated for the meetings of your Commission. The recollection of the Conferences of 1899 and 1907 can never pass from the memory of those who had the honor, and there are some of them amongst you, to take part in them. It would be unjust to allow those first steps in the organization of justice and peace to be forgotten. It is true that the artisans of those times had not the power and did not even dream of establishing at a single blow and at once the sovereign power of right. They know that the force of special interests and of passion remains and will remain always formidable. It took three centuries for Christianity to establish its empire in the world, and no one could have imagined that an international convention, however solemn, could suffice to realize what must be nothing less than a universal revolution.

"The work, however, is far from having been useless. Roads were opened. Methods were laid down. That generous idea which, since the time of Henry IV, thanks to the labors of the philosophers of the eighteenth and nineteenth centuries, has succeeded in winning the support of all superior intelligences, took for the first time at The Hague a concrete form in a series of international acts which were countersigned by the representatives of forty nations.[4]

After referring to the terrible war and the triumph of law and justice through the victorious arms of the Allied and Associated Powers, Mr. Bourgeois stated that the world again was ready to take up the cause of right and to secure its permanent triumph over force.

"Some points," he said, "will appear to you to be already certainly obtained.

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[3] League of Nations, *Official Journal,* July-August, 1920, p. 227.

[4] *Ibid.,* p. 228.

"The Court of Justice must be a true permanent court. It is not simply a question of arbitrators chosen on a particular occasion, in the case of conflict, by the interested parties; it is a small number of judges sitting constantly and receiving a mandate, the duration of which will, enable the establishment of a real jurisprudence on which public law may be built up. This permanence is a symbol. It will be a judgment seat raised in the midst of the nations, where judges are always present, to whom can always be brought the appeal of the weak and to whom protests against the violation of right can be addressed. Chosen not by reason of the state of which they are citizens, but by reason of their personal authority, of their past career, of the respect which attaches to their names known over the whole world, these judges will represent the truly international spirit, which is by no means, as some people pretend, a negation of the legitimate interests of each nation, but which is, on the contrary, the safeguard of these interests, within the very limits of their legitimacy.

"This Permanent Court will not be, as I have said, a court of arbitration, but a court of justice. The Court of Arbitration, whose eminent services we all remember, will certainly not cease to function in all the cases for which it was set up. But it has a special character, and its range of action is already determined. There is between the sentence in an arbitration and the decree of a tribunal an essential difference, a difference as profound as that which exists between equity and justice."[5]

Baron Descamps, elected President of the Advisory Committee only a few moments before the opening session, thanked the Minister for Foreign Affairs as representative of the Dutch Government for the hospitable reception of the Committee, and his old friend, Mr. Bourgeois, for the cordial words which he had addressed to its members.

In the course of his remarks Baron Descamps stated that there had been three peace conferences; two at The Hague and one at Paris. And he then proceeded to sketch very briefly the development of the idea of international justice, saying, and truly, that the conference held at The Hague in 1899 instituted for the first time an international court of justice based upon arbitration. He admitted that in several respects fault has been found with the work of 1899, in part well founded, and in part not. Thus complaint was made of the small number of controversies which had been laid before the Court of Arbitration. These he estimated somewhat generously at about twenty in all, and added:

It would appear somewhat exacting to demand of youth the experience of ripe age, and it is scarcely just to reproach the institution with inactivity when this is in a large measure due to the lack of re-

[5] League of Nations, *Official Journal,* July-August, 1920, p. 230.

sponse on the part of governments. We must admit, however, that the working of this institution is, under certain conditions, not always calculated to give a real stimulus to the goodwill of the governments and to bring to maturity the fruits which might be expected to result from a completely organized international justice.

It has been said that this is too costly an organ for the multitudinous matters which are in dispute, and one which lacks the guarantees of a truly permanent and professional judicature, such as we know to be assured in national jurisdiction, and the great advantages of a firm, continuous and progressive jurisprudence. There may possibly be a mistaken idea underlying this desire to model the organism of international jurisdiction upon the prototype of national jurisdiction. It would be well never to lose sight of what jurists mean, when, in their somewhat crude but expressive language, they assert that the "subject-matter" is not always the same, as in national communities the individual interest is subordinated to the sovereign government, while the international community is eminently one in which the sovereign states enjoy equal rights. Without, however, admitting in this case complete assimilation, it is unquestionably expedient to ascertain in what manner results, favorable in the national sense, can be attained by means which are appropriate to a clearly defined national situation.[6]

The Advisory Committee met for the first time in regular session after the formal opening, on the morning of June 17th. The President, Baron Descamps, was in the chair and presided over the first, as he did over every formal and informal session of the Committee. In addition, the following members were present:

Mr. Adatci.
Mr. Altamira.
Mr. Bevilaqua (represented by Mr. Fernandes).
Mr. Hagerup.
Mr. de Lapradelle.
Dr. Loder.
Lord Phillimore.
Mr. Ricci-Busatti.
Mr. Root.

To complete the organization of the Committee, Dr. Loder, Justice of the Supreme Court of Holland, was elected vice president at an informal session held prior to the opening session, immediately after Baron Descamps' election as president; and Mr. de Lapradelle was elected *rapporteur* on July 5th. The position of reporter is unknown in the English-speaking world but of the highest importance in international conferences, as it is his duty to explain and to justify in his re-

[6] League of Nations, *Official Journal*, July-August, 1920, p. 235.

port the work of the conference, and often, in accord with the committee and subject to its approval, to state the sense in which the texts voted are to be understood. Such a report, therefore, may be of very great value.

There was also selected a Drafting Committee, that is to say, a committee whose duty it was to form and shape the conclusions of the larger body, giving to them the order and precision of a code. It was decided that this committee should consist of the president, vice president and *rapporteur*, and a representative of the Anglo-American members to be designated by Lord Phillimore and Mr. Root.[7]

Professor Dionisio Anzilotti was delegated by the Secretary General of the League of Nations to act as secretary of the Advisory Committee, with Mr. Äke Hammarskjöld as chief assistant. A better choice could not have been made in either case. Dr. Anzilotti, in addition to great eminence in the field of international law, is deeply interested in international organization and is as helpful as he is interested. Mr. Hammarskjöld inherits a great name, and he seems destined to increase its lustre if health and years are added to ability and tact, poise and judgment.

## Procedure of the Advisory Committee

International gatherings, whether they be official in the sense that they are proposed by governments and composed of delegates appointed by governments, or whether they be informal conferences such as that of the Advisory Committee, have no rules of procedure prepared in advance and binding upon them. This is necessarily so, as each conference is independent of and separate and distinct from any other conference. Each, therefore, must determine its procedure for itself. In the present instance, a draft was laid before the Committee at its first business session, on June 17th. It was discussed, amended and adopted, to be honored more in the breach than in the observance, to borrow a phrase from the poet of the English-speaking peoples.

The Rules of Procedure provided that the sessions of the Committee were as a rule not open to the public; that the deliberations were confidential, although in special cases persons not members of the Committee might, for one reason or another, be admitted to its meetings; and that statements of the proceedings might be given to the press. It was, however, specified in this latter connection that names should

[7] It may be noted, for the sake of completeness, that the undersigned had the honor to receive this designation.

not be mentioned, and that all statements should be passed upon by the president and the secretary. The members of the Committee were alone authorized to take part in the discussions, although the secretary was permitted to make explanations in case of need. Advisers and private secretaries of members were permitted to accompany them, and with the consent of the Committee the adviser of a member could furnish explanations and otherwise take part in the proceedings.

According to the fourth article of the rules as originally presented, French and English were to be recognized as the official languages of the Committee, but as the result of discussion, the fourth article was omitted entirely, and the question of the official languages was reserved. At a later date, to be specific, on July 19th, when the Committee had finished its labors and was ready to report the final text, the question of languages was again taken up and, by unanimous agreement, French was chosen as the language for both the text of the project and the report.

The next article of the rules as finally adopted provided that the minutes of the sessions should reproduce in summary form the deliberations and the decisions of the Committee *in extenso,* as well as the declarations, projects and amendments which each member might propose. It was also provided that minutes of the previous session should be ready by the next day, so that members might make such changes in them as they should consider desirable or necessary for the perfect expression of their views. It may be said in passing that this privilege was used to such an extent that in some cases the revised minutes appear to convey a different impression from that to be gained in the session or from a perusal of the original minutes.[8]

Article 5 reproduced the usual requirement that projects and amendments should as far as possible be presented in writing and that in case this had not been done, their consideration might be postponed at the request of any member.

The sixth article contained a perfunctory provision that the programme of the next day's proceedings should be submitted by the president at the end of each session and that when adopted it should not be modified without a decision of the Committee to that effect.

Finally, the seventh and last article, in its amended form, provided for the adoption of decisions by a majority vote, that the various texts

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[8] The references to and quotations from the minutes in this Report are therefore taken from the original *Procès-verbaux.* The English version has generally been followed, but now and then a change has been made to bring the English into closer conformity with the French text.

adopted on first reading were to be submitted to a second vote, that dissenting opinions should be entered in the minutes of the session, but that at the request of interested members mention thereof should be made in the final report of the Committee.

Omitting a preliminary and unofficial meeting of the members present at The Hague on the 15th of June, another informal meeting on the afternoon of the 16th to choose a president to preside at the opening session, and the formal opening on that day, the Committee can be said to have begun its work on the 17th day of June and to have met approximately three hours every morning (excluding Sundays) with two exceptions. The session for Monday, June 28th, was omitted as the French member was obliged to be absent in Paris. The meeting on Tuesday was held from three o'clock in the afternoon, in order that he might be present. No meetings were held July 15th-18th, inclusive, to allow the British member to keep an engagement in England and to enable the Drafting Committee to prepare a draft of a project to be reported to the Advisory Committee on the 19th. Formal meetings continued to be held with these exceptions during the morning hours from the 17th of June to and including the morning of the 24th of July. In addition, the Committee met on four afternoons and had one long evening session on the 19th of July. The closing session was held at 3 o'clock on the afternoon of July 24th.

In addition to the official sessions of the Committee, there were three informal meetings—all at the request of Baron Descamps: the first, in order, if possible, to reach an agreement upon the constitution of the court through an informal but nevertheless authoritative exchange of views; the second, to reach an agreement upon the independence of the judges of the proposed court by forbidding them to hold certain national and international positions of trust and dignity; the third, to agree, if possible, upon the vexed question of the presence of temporary judges to be appointed by parties without permanent judges on the bench to take part in the trial and decision of cases to which their countries are parties.

There were three meetings of an informal character to consider the procedure to be followed by the court in the trial and decision of cases upon which substantial agreement was reached. No minutes were kept of these meetings, but their positive results were silently incorporated in the finished project.

Finally, the drafting Committee held four formal sessions in which it framed the first draft of the project, and its members met informally from time to time to consider the drafting of new articles and the revision of others.

Discussion and Adoption of Principle of Appointing the Judges of the Proposed Court by Concurrent Action of the Council and the Assembly of the League of Nations.

The Advisory Committee was without instructions from the Council, except that it was to draft a plan for a Permanent Court of International Justice under and in conformity with the terms of the Covenant relating to this institution. The nature of the institution was, however, defined by its name and, whatever method the Committee might recommend for its establishment and whatever procedure it should devise for the settlement of disputes referred to it, the tribunal was to be a court of justice, not a diplomatic body; it was to be permanent, at least in the sense that its judges were to be appointed and known in advance, not to be selected for a particular dispute and to go out of being when that should be determined.

The Conference of Paris, like the Hague Conferences, sought to provide methods of procedure to be followed when diplomacy had failed to adjust a controversy. Each of these bodies took what it believed to be appropriate action, or such action as could be taken at the time of its meeting and under the conditions then obtaining. By the Pacific Settlement Convention of the First Hague Conference, the signatory Powers undertook "to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention."[9] By this convention each Power was to select "four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators."[10] The term of appointment was six years and the names of the persons thus selected were to be inscribed "as members of the court,"[10] in a list to be notified to the signatory Powers. From this list, constituting the permanent panel of the court, a temporary tribunal was to be formed for the trial and disposition of any case which the contracting parties might, in their wisdom, refer to it. The idea therefore was that of a court of a permanent nature; but, in fact if not in theory, only the list was permanent, and the court itself when constituted was temporary.

The merits of the idea and the defects of the means were apparent to the members of the Second Peace Conference, meeting at The Hague in the summer of 1907, at which a project was adopted "to constitute,

[9] Article 20.
[10] Article 23.

without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence."[11] The members of that conference were unable, in the press of business and the limited time at their disposal, to devise a method of appointing the judges of this truly permanent court of justice acceptable to all its members. The conference, therefore, adopted a draft convention providing for the constitution of a Court of Arbitral Justice, its jurisdiction and procedure, and recommended to the signatory Powers to put this draft convention into force as soon as an agreement was reached through diplomatic channels upon the selection of judges and the constitution of the court.[12]

The representatives of the Powers at war with Germany and its Allies, or of those which had broken off relations with one or the other, met in conference at Paris in 1919, and revived this recommendation by incorporating it in the 14th Article of the Covenant. The Council of the League of Nations, by appointing a Committee of Jurists to devise plans for the establishment of a Permanent Court of International Justice, accepted the idea of the First Hague Conference, and brought nearer to realization the recommendation of the Second Hague Conference that there should be established in the midst of the independent Powers a Permanent Court of Justice, accessible to all, to extend the empire of law and to strengthen the appreciation of international justice upon which, to quote instead of paraphrasing the preamble to the Pacific Settlement Convention of each of these Conferences "are based the security of states and the welfare of peoples."

* * *

When the Advisory Committee of Jurists held their first regular meeting on the 17th of June, it was natural that Mr. Root, who as Secretary of State had instructed the American delegation to the Second Hague Conference to propose an International Court of Justice, should now suggest that the Committee take up the question where the Second Hague Conference had left it. Mr. Root therefore moved:

> That the Committee adopts as the basis for consideration of the subject referred to it the Acts and Resolutions of the Second Peace Conference at The Hague in the year 1907.

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[11] Draft Convention relative to the Creation of a Court of Arbitral Justice, Article 1.

[12] *Vœu* No. 1 of the Final Act of the Second Hague Peace Conference, 1907.

> That the provisions of the several plans for an International Court of Justice already elaborated by representative jurists of: Sweden, Norway, Denmark, Holland, Switzerland, Germany, Austria be laid before the Committee and considered as the subjects to which they respectively relate are taken up for consideration.

It will be observed that this Resolution consisted of two parts, Its author stated its object as regarded the first part to be "to give notice to all the world that this Committee will consider the great subject referred to it, not as an opportunity for the expression merely of our individual opinion, but under a sense of duty to build upon the basis of the past development of the subject to which so many members of the Committee have already contributed so well." Mr. Root continued saying that he would be glad to have the world know "that we begin here again the course of a development of the law of nations, the principle of justice in international affairs." This could not better be done than building upon the broad and deep foundations laid by the Hague Conferences. "There is throughout the world much respect and reverence for the self-sacrifice and devoted work done at The Hague in the Conferences of 1899 and 1907. I think the Committee should make clear the relations which it means to bear to all that work and all that was accomplished then, and I am sure that the clear understanding that the Committee is beginning its labors in this spirit will be very grateful to the people of all the civilized countries of the world. I know that it will be so among the people of my own country." Mr. Root, however, recognized the fact that thirteen years had passed since the adjournment of the Second Hague Conference, that since then much thought had been given to the question of an International Court of Justice and much progress made towards its realization.

The second part of the resolution was meant to supplement the first in that after taking The Hague as the point of departure, the members of the Committee were to avail themselves of the thought and progress made subsequent to the adjournment of the Second Hague Conference.

The Secretariat of the League of Nations had prepared a memorandum which analyzed and classified for the use of the Committee the various projects and suggestions for the establishment of a Permanent Court of International Justice which had been made in the Second Hague Conference, in the period following its adjournment, and which seemed likely to be of value to the Committee. To the memorandum were appended copies of the projects, which, in so far as they concern

the appointment of the judges and the constitution of the court, are likewise appended to this report.[13]

It will also be observed that Mr. Root had in mind the project of the five Powers, Sweden, Norway, Denmark, Holland and Switzerland, whose representatives had met at The Hague in the month of February, 1920, and drafted an admirable plan, based on the labors of the Hague Conferences, which he wished to have laid before the Advisory Committee and treated as if it were a report of a subcommittee to be consulted in connection with each article as it arose. In addition he was anxious to have the plans of Germany and Austria laid before his colleagues which the president of the Peace Conference of Paris had, over his signature, assured those delegations would be taken into consideration.[14]

The Committee, however, was unwilling to bind itself at this stage of the proceedings to take the Draft Convention of 1907 as the basis of its discussion. It was not averse to an expression of appreciation of the value of the labors of the First and Second Hague Conferences, but it wished to enlarge the scope of the first part of Mr. Root's resolution so as to include in its appreciation subsequent activity. The Committee therefore unanimously adopted and made public the following declaration:

> The Committee begins its deliberations by rendering in first instance homage to the labors of the Peace Conferences of The Hague which have already prepared with exceptional authority the solution of the problem of the organization of a court of international justice.
>
> Ready to consider in addition the projects emanating from governments, from conferences initiated by governments, of sei-

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[13] The Appendix contains in addition: (1) The Draft Convention for the proposed Court of Arbitral Justice of the Second Hague Conference; (2) a summary taken from the memorandum of the Proceedings of the Second Conference, relating to the appointment of judges; (3) the text of the American draft on the appointment of arbitrators, submitted to the Commission of the League of Nations of the Paris Peace Conference of 1919.

[14] See Note of May 9, 1919, with accompanying draft Covenant of the German delegation, and Mr. Clemenceau's reply of May 22 (*Notes échangées entre le président de la conférence de la paix et la délégation allemande du 9 mai au 28 juin 1919,* issued by the Paris Peace Conference of 1919, pp. 4-5, 6-7); Note of June 23, with appendices containing suggestions for a covenant, of the Austro-German delegation (*Notes de la délégation de la République d'Autriche, 22 mai-6 août,* issued by the Paris Peace Conference of 1919, pp. 86-95), and Mr. Clemenceau's reply of July 8, 1919 (Mrs. C. A. Kluyver, *Documents on the League of Nations,* pub. by the International Intermediary Institute of The Hague, 1920, p. 152).

entific international associations, and of jurists of every nationality, whose labors have preceded its own, it will take note of all sources of information which are at its disposition in order to justify the confidence of the Society of Nations.

When the Committee had agreed upon rules of procedure for the conduct of business before it, the question arose as to whether its members should present on the threshold projects or proposals for the composition of the court, which had been the obstacle in the way of the Hague Peace Conference of 1907, or whether there should be a general exchange of views. The first would have been the Anglo-American method, which prefers a concrete draft. The second is the method of international conferences which prefer a free and unlimited exchange of views. The latter method prevailed, with the understanding, however, that the members in alphabetical order should express their views, but that this exchange should be limited to the composition of the court.

On the 17th of June Mr. Adatci, of Japan, first presented the principles which, in his opinion, should prevail in the composition of the proposed court. It is unfortunate that this address was not taken down in full and that only the briefest skeleton exists in summary form, inasmuch as it stated in clear, precise and admirable terms the views of what might be called the great Powers, and gave the reasons for those views without hesitation and without reserve, although they might not be palatable to the so-called small Powers. Having the courage of his convictions, he presented a project which secured to the large Powers the representation and influence in the court which he, and no doubt his country, thought that they deserved and therefore should have. Mr. Adatci frankly admitted that the principle of the equality of states prevailed generally throughout the world and that he personally was in favor of it; but that as a "sociological jurist," who weighs facts as well as theories in the balance of his judgment, he was only in favor of equality when it accorded with the facts or when the facts permitted it to be applied. In other cases it was a fiction that did not correspond with the realities of the world, which must be taken into account if the court to be created was to live. A large state, he added, should have a larger influence, because the peace of the world depends upon the large states and because the so-called great Powers in fact furnish the different juridical systems which must be represented in and understood by the court where they will inevitably be the subject of discussion. After a somewhat detailed examination of this phase of the question, he declared it to be his opinion that not only from the stand-

point of power and influence, but also from that of wealth and of civilization, which make up power and influence, the large states represent the very elements which are the basis of human activity.

Therefore, he proposed that in the composition of the court the Committee should frankly recognize the realities of life, that is to say, the existence of the great Powers, on the one hand, and of the small Powers, on the other; that each element as such should be represented in the court and that adequate guarantees be given that the large Powers should not trample upon or be unmindful of the rights of the smaller states. He accordingly proposed that the court should consist of thirteen judges, five of whom should be appointed by the great Powers and eight elected by the small Powers according to their pleasure. In this manner he contended the great Powers would be permanently represented and would have a sufficient guarantee for their interests. The small Powers would always have a majority and therefore the decision in every case would be made by the small Powers, if there were a division between the great and small. The moral influence which permanent representation would give the great Powers would, he thought, be in itself sufficient to secure the acceptance of their views when their views were just; the numerical preponderance of the small Powers would prevent the triumph of the views of the great Powers when they were not just; the small states as such would, in any event, always collaborate in the development of international law and, because of their majority, be a predominant element in its development. The large Powers, he felt sure, would, because of their permanent representation, consent to be judged by the small Powers, who would always form the majority of the court.

Passing from the domain of speculation, Mr. Adatci called the attention of his colleagues to the fact that, after weeks of discussion, the Committee on Communications and Transit, appointed by and under the League of Nations, had ultimately reached the conclusion that the large Powers should be permanently represented in the permanent committee to deal with those subjects, although at first that committee had rejected the principle as contrary to the principle of the equality of nations. Adverting to the advantage which each great Power would possess in having a judge of its nationality in the court at the moment of a decision in which it was interested, Mr. Adatci said that he was willing to accord the same advantage to all states in litigation which might not have judges upon the court. Therefore, he proposed specifically that in such an event the litigating nations should each appoint *ad hoc* a judge, even though this should raise the number of judges to fifteen.

The Dominions and self-governing colonies of Great Britain possess, as members of the League, the same rights as other members and would in Mr. Adatci's plan be entitled to appoint temporary judges. To prevent misunderstanding on this important point he specifically mentioned the British Dominions and self-governing colonies as so entitled.

Mr. Altamira of Spain expressed his views as to the composition of the court at the session of June 18th, saying, according to the minutes of that date, that the question of the nomination of judges was the most important problem, "more particularly because it is closely connected with three other questions, that is to say: (1) the criterion of eligibility for appointment as judge, (2) the determination of the finality of the court, (3) the question as to whether submission to the jurisdiction of the court shall be voluntary or compulsory."

These three essential questions should in his opinion be considered and decided by the Committee. Doubt should, he said, be avoided. "It must be recognized," to quote again his views as recorded in the minutes, "that no political questions are outside the scope of justice; all questions, whether political or economic, are ultimately questions of justice." In the matter of the appointment of judges he was clearly of the opinion that "the method of nomination of judges is directly connected with the principle of equality of states," and he referred in this connection to the method adopted by the Conference of Associations for the League of Nations, held at Brussels, December 1-3, 1919, as embodying the principles which should be applied in the appointment of judges. The method proposed by this conference is thus stated:

> In the organization of the International Court of Justice it shall be stipulated that the court shall not include more than one judge of any one nationality. In the election of judges the principle of equality of states shall be respected. The judges shall be chosen from a list of candidates proposed by the states. Each state shall have the right to propose a maximum number (to be agreed upon) of candidates of its nationality and, in order to indicate clearly that the judge is exclusively in the service of justice, each state shall propose a larger number of candidates of other nationalities.[15]

Mr. Altamira thus contented himself with a declaration of principle, without going into detail.

Mr. Fernandes of Brazil was not present at this session, and the project and memorandum prepared and sent by Mr. Bevilaqua for sub-

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[15] *Mémorandum sur les différentes questions concernant l'établissement de la Cour Permanent de Justice Internationale présenté à la Commission de juristes chargé de préparer le projet relative à l'établissement de cette Cour*, p. 41.

mission to the Committee had not arrived. It was presented on June 28th. However, for the sake of completeness it is considered in this connection. This project consisted of forty articles and was supported by an elaborate and interesting memorandum. It provided for a Court of International Justice to be composed of nine judges to be appointed for life, to reside at the seat of the court, which was likewise to be the seat of the League of Nations. There were to be six supplementary or deputy judges to replace the titular or regular judges in case of absence. The titular judges and the six supplementary judges were to be elected by the Assembly of the League of Nations from international jurists and persons holding high judicial office. These judges, both titular and supplementary, were to be chosen without regard to nationality, and were to be selected solely because of their exceptional knowledge and distinguished reputations. However, none of the five geographical divisions of the world should have more than five titular judges nor more than three supplementary judges.[16] The states constituting the court were to prepare a list of the names of the supplementary judges, arranged in alphabetical order, according to which they should be summoned to replace the titular judges who were unable to be present. In case of a vacancy in the court, the court itself should elect a supplementary judge to fill the vacancy. In case of vacancies in the offices of supplementary judges, the court likewise was to select the new supplementary judges to be chosen, as in the case of the titular judges, without respect to nationality and solely upon the grounds of exceptional knowledge and distinguished reputation.

Although this project was never discussed by the Committee it was read by its members, and it may be said in passing that a court so composed would do justice to geographical divisions of the world, but at the expense of many deserving nations with jurists of world-wide reputation. If Europe, for example, could not have more than five judges, it is difficult to see, according to this plan, how the small states of the Continent could secure adequate representation in the court except by the exclusion of the great Powers.

Baron Descamps, the President of the Commission, presented on June 21st an elaborate plan for the organization of the court, indeed for a series of courts, using for this purpose the Permanent Court of Arbitration created by the First Hague Conference of 1899, in which he had been an influential member and is deservedly held in remem-

[16] The French text is as follows: "aucune de cinq parties du monde n'aura plus de cinq juges titulaires ni plus de trois suppléants."

brance for the creation of the Court of Arbitration to which he contributed so effectively. Leaving aside for the moment his proposal of a High Court of International Justice, composed of one member for each state elected by the members of that state from its members on the Permanent Court of Arbitration with jurisdiction in matters which affect international public order, such as crimes against the universal law of nations, the Permanent Tribunal of International Justice proposed by Baron Descamps was to consist of nine titular judges and six supplementary judges, to be "elected by the members of the High Court of International Justice, so as to constitute, in accordance with the first article of the Draft Convention of 1907, a jurisdiction freely and easily accessible and based on the principle of juridical equality of states. The tribunal shall include judges representing the principal juridical systems of the world and capable of securing the continuity of international jurisprudence." With the exception of the phrase relating to the juridical equality of states, which is an "intruder," the last sentence of the quotation is taken from the text of Article 1 of the Draft Convention for the Court of Arbitral Justice.

Baron Descamps' project betrayed the skill of a tried and steady hand. His purpose was to preserve intact the Permanent Court of Arbitration created by the First Hague Conference, as without the cooperation of the members of this court the proposed Permanent Court of International Justice could not come into being, since they were to elect its judges. In the next place he skilfully availed himself of the first article of the Draft Convention for the Court of Arbitral Justice adopted by the Second Hague Conference of 1907. The project was exceedingly adroit, as Baron Descamps sought to eliminate the question of the equality or inequality of nations by having the judges appointed to represent the various juridical systems of the world which, in the Baron's view, the so-called great Powers happened to possess. Perhaps he somewhat weakened his case by openly avowing in his remarks justifying his project, that the purpose for which the principal juridical systems of the world were invoked was to secure to the great Powers permanent representation. Doubtless these Powers, desiring to secure what the Baron was willing to accord, would have accepted his theory without questioning its validity; but the small states, while willing to allow, as the event proved, judges to be chosen with respect not merely to the principal juridical systems, but also to the great forms of civilization, were nevertheless unwilling to have either or both of these elements used to attribute to the great Powers permanent representation in derogation of the principle of juridical equality.

Baron Descamps' project would have required the presence at The Hague of one member from each of the countries parties to the Permanent Court of Arbitration, as the election of judges was to take place in that city, a feature almost as objectionable to the Committee as the election of the judges by an assembly composed of one member of each state represented in the Permanent Court of Arbitration. Nevertheless the Permanent Court of Arbitration was not overlooked or its coöperation rejected in the selection of judges, for to it, as will presently be seen, is entrusted the preparation of the lists of persons from whom the judges of the Court of Justice are to be chosen by the concurrent and independent action of the Assembly and Council of the League. In this way and to this extent the Baron accomplished the purpose which he had in mind, of preserving intact the Court of Arbitration of 1899 and of maintaining the relation of parent and child between the Court of Arbitral Justice of 1907 and the tribunal to be created in 1920.

Mr. Hagerup did not present a definite plan, but stated the principles which he thought should prevail in the selection of judges. By way of introduction, he premised that his starting point was that of Mr. Altamira, that every question submitted to a court can be reduced to a legal question. Therefore, methods of forming administrative committees dealing with other than legal questions should not necessarily be followed in the creation of a court of justice, for he was aware from practical experience that international disputes might present themselves in such a form and guise as to make it necessary to consider them from other than legal points of view, thus making it desirable to maintain the Permanent Court of Arbitration alongside of the proposed Permanent Court of International Justice. Without stopping to consider the relation between these two institutions, he was of the opinion that the new court should be a juridical organization, and that in the domain of law, as distinct from that of administration, there was and is one indispensable principle, the equality of sovereign states, which should be applied in creating such an institution.

Recalling a phrase of Lord Phillimore, "In the eyes of law all states are equal," Mr. Hagerup added that this phrase is "the Magna Charta of the smaller states. . . . Political considerations should not be taken into account for the settlement of juridical problems." And he was convinced, he said, that if the element of inequality was introduced into the plan for a proposed Court of Justice, the plan would fail as did the plan of 1907. But, although he wished legal questions to be solved by legal process without injecting political considerations,

nevertheless, the political phase of the question was not lost upon him, as he said in this very connection that "the Scandinavian countries and Switzerland would oppose its adoption," and that it would be impossible to accept Mr. Adatci's proposed compromise.

Coming to the immediate problem before the Committee, Mr. Hagerup was prepared to accept any method of nominating the judges for the proposed court which was not inconsistent with the principle of the equality of states. The method which he would prefer was that contained in the joint project of the Scandinavian countries, in whose preparation he had taken part. But, without insisting upon this draft, he stated that the project of the neutral Powers of February, 1920, commonly called the Five Power Plan, and also the project of the *Union Juridique Internationale* of June 5–12, 1920, seemed to be entirely acceptable. The really important thing, he concluded, "is to find, without taking into account the political considerations, independent judges in possession of the highest competency, the largest experience, and the highest moral character."

The Scandinavian project to which Mr. Hagerup referred is the draft convention prepared in the course of 1918 by official representatives of the Governments of Sweden, Norway and Denmark. It is to be observed that it antedated the formation of the League of Nations, as its work was concluded before the Conference of Paris of 1919 began its arduous labors. There is, therefore, no reference to the League of Nations, as in the case of the Five Power Plan and the project of the *Union Juridique Internationale* which Mr. Hagerup found acceptable. The Scandinavian draft, however, took into account the agencies created by the Hague Conferences and used them for the creation of the new court. In this respect, and in detail, there was a marked similarity between the project presented by Baron Descamps and that devised by the Scandinavian Powers, to which fact Mr. Hagerup adverted in the course of the sessions.

Briefly stated, the court was to be organized, according to the Scandinavian plan, as far as possible upon the principle of the juridical equality of states. It was to be composed of fifteen members, chosen without respect to their nationality, in which no one state could have more than two members, or in the alternative more than one.

Coming now to the question of election, which Mr. Hagerup called the crux of the question:

> The members of the Court of Justice are elected by an Electoral Assembly in which each state is represented by the first in numerical order of its judges in the Permanent Court of Arbi-

> tration at The Hague, or if this member is prevented, by the next member who is not prevented.[17]

So much for the principle: next as to the application of the principle.

> The election is based upon a list comprising all the candidates proposed by the governments. Each government presents at most as many candidates as there are places to be filled in each particular case, and at least one-half of this number. No independent proposal may be formulated within the Electoral Assembly.[18]

It will be observed that the clear and fundamental distinction is drawn between the privilege of proposing and the duty of electing. The governments propose and the Assembly, composed of one from each national group of the Court of Arbitration, elects. How does the election take place? "The Electoral Assembly meets at The Hague for the first time on June 1, . . ., or upon the next week day and thereafter at the same time *every six years,*" or in the alternative "every three years."[19] The designated member of each national group was to be notified and to be invited to The Hague by the International Bureau of the Administrative Council of the Court of Arbitration. The members were to choose their president, but before proceeding to the election of the judges of the court they were to be required to exchange views and to discuss the qualifications of the persons proposed for election as judges. Only the electors were to be entitled to vote. Each judge was to be elected by a separate ballot and a majority of votes cast was required for election. If, however, after the second ballot, no candidate had received the absolute majority, a third ballot required only a simple majority. In this plan the titular judges, fifteen in number, were to be elected for life, or, in the alternative, for nine years; the supplementary judges, likewise fifteen in number, for six years, or, in the alternative, until the next meeting of the Electoral Assembly. The rank or precedence of the supplementary judges was to be fixed by the Electoral Assembly at the time of their election, and, in case of a vacancy among the titular judges of the court the first supplementary judge, in the order of rank, was to fill the vacancy and to hold during life, or, in the alternative, during the balance of the term of the judge whom he succeeded. A titular judge temporarily absent was to be

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[17] Article 12, Appendix, p. 204.
[18] Article 13, Appendix, p. 205.
[19] Article 14, *ibid.*

replaced by a supplementary judge in the order of rank, to hold office as long as it should be necessary.

Finally, in so far as the present matter is concerned, a titular judge having reached the age of sixty-five and having served ten years could retire with the right to salary during the remainder of his life, and, in any event, a titular judge seventy years of age was to be retired with the continuation of salary during life.

It is to be observed in this connection, that in the Scandinavian plan, as in that of Baron Descamps, the designated member of the national group was to proceed to The Hague to make the election. It will be later noted that in the scheme of appointing the judges actually adopted by the Advisory Committee for the Permanent Court of International Justice, the order is reversed. The national groups of the Permanent Court of Arbitration propose the list of candidates for election, but the governments themselves elect the judges.

After Mr. Hagerup had expressed his views, Mr. de Lapradelle proceeded to state the principle which should prevail in the appointment of judges. Like Mr. Hagerup, he did not present a plan in his own name, but he laid before the Committee the project of the *Union Juridique Internationale*, of which organization he is the untiring Secretary General, which, it is believed, expressed his views, inasmuch as he had taken a leading part in framing it, just as Mr. Hagerup had shared in the preparation of the Scandinavian plan.

The project for the general organization of a Permanent Court of International Justice drafted by the *Union Juridique* contemplated a court of fifteen titular judges and six supplementary judges. Eight titular and three supplementary judges were to be of European nationality; five titular and two supplementary judges of American nationality; two titular and one supplementary judge of Asiatic nationality. All judges, titular as well as supplementary, were to be elected for a period of nine years by secret ballot of the Assembly of the League of Nations. A list of persons eligible for election was to be prepared by the Secretary General of the League of Nations. This was to include not more than three names to be proposed by the government of each of the states members of the League of Nations, and apparently an unlimited number of names proposed by international scientific institutions, to be designated by the League of Nations, exclusively devoted to the study of international law. However, the list thus prepared was for the guidance of the Assembly; it was not to bind the Assembly, inasmuch as the Assembly was free to elect others than those included in the list.

The titular judges were first to be elected, then the supplementary judges, in the first instance by absolute majority. Failing this on first ballot, simple majority was sufficient. It was further provided, in so far as the method of composing the court was concerned, that not more than one titular or one supplementary judge should be chosen from any one nation, and that if two members of one and the same nationality should receive the requisite number of votes for election, the one having the larger vote should be declared elected, the older in case of tie.

Without adding the arguments which militated in favor of his opinion, Mr. de Lapradelle declared at the session of June 18th that, in his conception, the distinction between the political and the juridical points of view was fundamental; that in the domain of law states are equal and that the equality of states in respect to the nomination of judges is the necessary consequence of this principle.

Mr. Justice Loder, of the Supreme Court of Holland, who followed Mr. de Lapradelle, began by expressing pleasure that most of the members had spoken in favor of the principle of equality of states, "the principle," he said, "which has inspired, among others, the Hague scheme of February last"—the project of the neutral states, more commonly called the Five Power Plan—upon which Mr. Hagerup had just put the seal of his approbation. "It is necessary," Mr. Justice Loder continued, "to realize first of all that the question to be solved is a juridical question, and that the most efficacious means must be found for the protection of the juridical character of the new organization." Therefore, he expressed himself as in thorough accord with the views expressed by Mr. Altamira, Mr. Hagerup and Mr. de Lapradelle. Mr. Justice Loder apparently hesitated to lay before the Committee the text of the Five Power Plan, in the formation of which he had taken the leading part, having presided over the conference which drafted it. It was perhaps unnecessary that he should do so, as a copy of the plan had been sent by the Secretariat to each of the members of the Advisory Committee before their meeting at The Hague. They were therefore familiar with its provisions. Mr. Justice Loder, however, presented to the Committee a copy of his address on a Permanent Court of International Justice, which he had delivered before the International Law Association at Portsmouth on May 28th, 1920, and which can therefore be taken as the most recent expression of his views. It is regarded by himself as authoritative.

In the course of this address, after referring to the great and legal principle of the equality of states, which should be the cornerstone of the court, and after stating that the judges should be independent, be-

longing to no country, representing no nation, against whom outside influence should be powerless to prevail, he maintained that "the only difficulty is to find a system which assures the election of fit men." And, with the honesty characteristic of his country, he added, "I believe that the Hague plan furnishes these guarantees." What is this plan, according to Mr. Justice Loder? "It comes to this," he says:

The choice of judges is made by the Assembly in which each state has one vote. An absolute majority of votes is necessary to make the appointment valid. But two things precede the election. First, the drawing up of a list of candidates from which alone an appointment can be made, and secondly, a debate on these candidates in a meeting of the Assembly. Each state submits its list. Before doing so, it is obliged to ask the advice of its highest judicial and administrative functionaries. And not more than one-third of the names submitted by each state should be those of nationals. Two-thirds of the names would therefore be those of non-nationals.

The immediate result will be that the names of the foreigners on each list will necessarily be those of famous men, and that those who ought to be considered the most serious candidates will necessarily occur on a number of lists.

The consequence will be a perfectly legitimate preponderance of the great Powers. There are many more French, English, American, Italians, and Japanese, than Dutch, Swiss, Danes or Norwegians. And it is therefore probable that a larger number of persons belonging to these nations will be prominent enough to be considered as serious candidates. Naturally their names will figure on several lists. The Secretariat of the League now composes one list from all those sent in, stating behind each name, if submitted more than once, how often it occurs, without mentioning the names of the states who presented them.

The list thus shows automatically the names of the most prominent candidates.

Next follows the debate on these persons.

And the voting takes place after the debate.

Lord Phillimore, who, after a distinguished career at the English bar, had had the great advantage of nineteen years' experience upon the bench and was at that moment a member of the Privy Council taking part in the decision of most important cases, brought to the Committee the wisdom born of experience. The court, to meet with his approval, would naturally be one composed of judges, that is to say, of persons who had had actual experience in the trial and the decision of cases, not jurisconsults or men of theory. In such a court the great Powers—using the word "great" in the usual sense of large and populous—would have confidence because decisions would be ren-

dered by persons trained in the practice and administration of law. But in order that the great Powers should have such confidence in the decisions of the court, as to secure their execution by physical force if need be, it was necessary that the great Powers should be represented permanently in the court. Otherwise, the inhabitants of the various great Powers would not be satisfied to submit to, or to enforce judgments given by a court in which their respective countries were not represented. For these reasons, Lord Phillimore expressed himself in favor of Mr. Adatci's proposal, which secured permanent representation to the great Powers and assured to the small Powers a constant majority. The interests of the large and the rights of the small Powers would be recognized and safeguarded.

Mr. Ricci-Busatti began his remarks by stating that his point of departure was different from that of his colleagues, but that his conclusions were much the same. The difference between law and politics had been pointed out, and yet he felt that it was impossible exactly to define this difference. In the same way he felt it impossible to draw the line between arbitration and justice. For these reasons it seemed to him impossible to base the new court on a distinction between law and politics or between equity and justice, apparently meaning that the new organization should be able to assume jurisdiction and to decide any dispute submitted to it, whether it were legal, equitable or political. The purpose of the court to be created was to settle disputes between states by authority other than that of the states themselves. Such a court, in his opinion, would be the result of a gradual development, and a court of justice would gradually emerge from a court of arbitration. To perform its functions it should have independent life, and yet at the same time it would ultimately depend upon the cooperation of states. It was, however, necessary to attempt to draw the line between the judicial and the political functions of the state, and if this could be successfully accomplished and these two functions separated, it would greatly aid the development of international law and advance the cause of international justice. The court contemplated by Mr. Ricci-Busatti was one which, while being separate and distinct, was nevertheless to be developed from the Court of Arbitration, and in this court some means was to be found to secure to the great Powers permanent representation; or, to quote his exact language on another occasion, giving fuller expression to his views:

1. It is expedient that the Court of Justice be as intimately connected as possible with the Court of Arbitration, the functions of which it is to develop.

2. It would seem necessary for the fundamental principle of the legal equality of states to be admitted with due regard to the Powers who enjoy a preponderating influence in the League.

3. It would seem useful for the Assembly of the League to participate in some way in the constitution of the Court.

4. From a practical point of view, it seems, in my opinion, necessary that the constitution of the tribunal in each special case should be provided for by special provisions; the wishes of the parties should in this respect be taken into consideration.[20]

It appeared to the members of the Committee that Mr. Ricci-Busatti was more in favor of arbitration than judicial decision, and that the court of his preference was one permanent in form and temporary in its constitution, leaving to the parties in dispute the right and power to modify its membership in accordance with the supposed requirements of the case to be submitted. His remarks were of a general nature, by way of introduction to a plan which he reserved the right to present at a later date. On the 23rd of June he presented this plan. On the 30th of June he added to it, and on July 7th he laid before the Committee a substitute for the articles of his previous projects dealing with the appointment of judges. All these plans, however, were in accordance with, and indeed were the natural consequences of the views which he had expressed in his opening remarks and they were so understood by his colleagues. Each project was considered as contrary to the fundamental purpose for which the Advisory Committee was assembled, which was, in the opinion of its other members, to form a permanent court, not to devise a method for the creation of a series of temporary tribunals. For this reason his views, which were listened to with respect, did not have the influence in a Committee called to create a Permanent Court of International Justice which they would have had if the business of the Committee had been to revise the Permanent Court of Arbitration of 1899.

It is natural that Mr. Ricci-Busatti should have formed a prejudice for a temporary as distinct from a permanent tribunal, inasmuch as the Italian project for the constitution of an International Court of Justice presented to the Conference in Paris, or rather to its Commission for the League of Nations, advocated this method. According to this project, which was sent in advance by the Secretariat to all members of the Advisory Committee, the International Court of Justice was to be composed of a judge appointed by each state for a period of six years. This court, made up of as many judges as there were members of the

[20] Plan presented to the Committee, June 23rd.

League of Nations, was to elect its president and vice president, and from this large body, more properly called a judicial assembly than a court, a section was to be formed for the trial and disposition of each case. The section was to be composed of the president of the court, or in case of his absence, of the vice president; of one judge chosen by each of the parties in litigation from among the members of the court, and four judges elected by secret ballot by the court among its members. These four judges of the temporary tribunal for the trial of the case were to be thus selected: each member of the court was to vote for two names, and those obtaining the majority were elected. If, however, because of the number of parties to a dispute, it happened that a section was composed of an even number of judges, the court would elect five judges among its members, each member voting for three names. In case of tie the oldest was elected. Finally, if one of the parties failed to designate its judge, then the court itself was to elect him by secret ballot or by special vote.[21]

This exchange of views disclosed the fact that in 1920, in the Advisory Committee of Jurists assembled at The Hague, the obstacle in the way of the constitution of a Court of International Justice was none other than the obstacle which stood in the way of its realization at the Second Hague Conference in 1907. That obstacle was the claim of the so-called great Powers to permanent representation in the court irrespective of the so-called "equality of nations," and the claim of the so-called small states that the principle of equality should be strictly observed in the formation of the court which would, at least in theory, deprive the great Powers of their claim to permanent representation, although in practice the judges of the large states might be, or indeed would be appointed or selected. This was the rock on which the Conference of 1907 split; this was the rock on which the Committee of Jurists of 1920 would split unless a method could be proposed which would reasonably satisfy the claim of the great states to permanent representation, without apparent violation of the principle of equality for which the small states have stood, now stand, and always must stand if justice, irrespective of the physical power of the states, is to prevail between nations. For, as Joubert has so truly and happily said, "There are two Forces which rule the World: Might until Right is ready."

That method was proposed by Mr. Root, taking advantage of the agencies of the League of Nations, and taking advantage also of the

[21] For the text of this project, see Appendix, p. 199.

experience of his own country in harmonizing the interests of the greater states with the principle of equality demanded by the smaller states in the formation of the American union.

The delegates of the American states which met in conference in Philadelphia in 1787, found the same obstacle in their way, and, unable to remove it, circumvented it to the satisfaction of the large and the small states. It was agreed that a legislative organ of the union should be created, to consist of two branches. In the House of Representatives, each state was to be represented according to its population, thus securing to the larger states a larger representation than to the smaller states. The larger states proposed that the second chamber, called the Senate, should be composed in the same way, thus assuring them a majority in that, and therefore in each branch. The smaller states were willing to allow this method to be applied in the House of Representatives, but insisted that in the Senate, each state, large or small, should have an equal representation, ultimately fixed at two, after weeks of discussion and a threat of the smaller states to withdraw from the conference rather than to accept the inequality of representation.[22] Wisdom prevailed. The interests of the large states were safeguarded in the House of Representatives, the interests of the small states, more numerous than the large, and destined always to be more numerous, were safeguarded in the Senate; and that there might be no doubt as to the right of equality of representation in the Senate which would secure for all time the rights of the small states, it was moved and unanimously carried, without being put to vote, that in any amendment to the Constitution, no state, without its consent should be deprived of its equal suffrage in the Senate. This proposal was made on September 15th, the last business day of the Conference, after the Constitution which was signed on September 17, 1787, had been agreed on, to quiet "the circulating murmurs of the small States."[23]

As, however, the question is so important in itself, and as the

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[22] In his Debates of the Federal Convention, Mr. Madison, of the big state of Virginia, thus reports under date of June 15, 1787, Mr. Dickinson, delegate from Delaware, the smallest state represented and the second smallest of the Union: "You see the consequence of pushing things too far. Some of the members from the small States wish for two branches in the General Legislature, and are friends to a good National Government; but we would sooner submit to a foreign power, than submit to be deprived of an equality of suffrage, in both branches of the legislature, and thereby be thrown under the domination of the large States." *Documentary History of the Constitution of the United States,* Vol. III (1900), pp. 124-125.

[23] *Ibid.,* p. 758.

unanimous adoption of this method by the Advisory Committee suggests the probability of its adoption by the League of Nations, it is advisable to give the reasons for and the form of the proposal as stated by Mr. Root in the session of June 18th.

Without questioning the theory of the equal rights of sovereign states which, as he truly said, "is the foundation of the law of nations," and recognizing, on the other hand, that states possessing large masses of people have practical interests depending upon "their production, their trade, their commerce, their activity," larger than those of other equal sovereign states with less production, trade, commerce and activity, Mr. Root asked if some method of constituting the court could not be found which would be consistent with the two principles, namely, "the one coming from the constituted and indisputable point of legal equality of states and the other from the practical point of view of a deep and extensive practical interest in the subject." This, he said, was the problem, and it was not a problem confined alone to nations. It was to be found within any free country where citizens are called upon to determine some question regarding which they have each equal rights politically, but in which, as a matter of fact, some have more practical interest. On this phase of the subject, Mr. Root spoke as an American, referring to the experience of his own country:

"Allow me," he said, "to refer to an example which naturally arises in the mind of an American. When the present Constitution of the United States was formed there was precisely the same kind of question raised in the Convention of 1787. We were all independent, sovereign states—some large, some small. The large states were unwilling to permit the majority of the smaller ones the control which would come from equal representation, and, on the other hand, the smaller states were unwilling to allow to the larger ones the preponderance of power which would arise from the recognition of their greater population and wealth."

How were these divergent points of view reconciled? "That *impasse* was disposed of by the creation of two chambers, in one of which the states are represented equally, and another in which the population is represented without reference to the sovereign states in which the people reside." Mr. Root did not propose that this method be accepted as such. Without dwelling further upon this matter, and using it only to show how different interests could be reconciled, Mr. Root called attention to the Peace Conference at Paris, composed of representatives of large and small states which, without satisfying the views of either, created the League of Nations, in one chamber of which, the Assembly,

every Power great and small is equal to every other, and in the other chamber, the Council, there is a preponderance of the great Powers:

"I beg to suggest," Mr. Root continued, "for the consideration of my colleagues, whether possibly the election of judges by the concurrent vote of the Assembly and the Council might not point out, for our purpose, the same solution of this difficult question which already has been accomplished on the political side. That would have several advantages. The effect of the necessity of concurrent action by two bodies is that neither one can do anything which is oppressive in respect to the interests specifically represented by the other. That is so in the making of all laws, and it is so when appointments are to be made by legislative bodies. The effect of the practical working would be, that in the Assembly, where the smaller Powers are in majority, they would protect the interests of the smaller states, and that in the Council the larger Powers having a preponderance would protect such practical interests of their greater trade and their greater production and the greater interests as would be submitted to the court."

In the event of a difference between the Assembly, on the one hand, and the Council, on the other, a small committee of conference could be appointed which, Mr. Root said, was the practical method of reconciling differences between two bodies, again drawing upon his experience as an American and as a Senator of the United States.

In addition to its intrinsic merit, this method had the very great advantage which could not well be, and indeed was not lost upon his colleagues, of recognizing the power of the Council to which the Advisory Committee was to report its plan and also, as far as the Council was concerned, the power of the Assembly to which the Council would report its project.

At the session of June 21st, Mr. Root further explained his project, saying in his opening remarks, that there appeared to be two fundamental principles laid down by the members of the Advisory Committee with which all agreed,—that the end to be attained is justice and that the equality of sovereign states, to which proposition all the members were agreed, must be maintained, as it is "the substratum which underlies the law of nations; without that there is no law, and we return to the days of barbarism and unrestrained brute force."

In regard to the first principle, Mr. Root said that the task is one of the adaption of means to an end. In applying the second principle it is necessary to consider the nature of the transaction and to see whether the principle really covers that transaction. As the principal of equality was invoked, Mr. Root found it necessary to define the equality of states and to see whether in reality it entered into the appointment of a court. In his opinion the principle was definitely limited. Thus:

The equality of states does not mean that they are equal in number, in extent of territory, in wealth, in power; it means that they are equal in the sovereign right to control their own actions and to freedom of accountability to others. It relates to the rights of each state over its own territory, its own subjects or citizens. Every state is exercising that right in agreeing or refusing to agree to any arrangements we propose. Monaco, Luxemburg, Haiti, San Domingo, have the same inalienable right to consent or refuse to consent as Great Britain or France. That is the exercise of equality. In brief, it is equality in the exercise of the rights of sovereignty.

So much for equality in general. Passing now to the specific application, Mr. Root said:

When, however, we come to the creation of a court, we pass beyond the exercise of the rights of sovereignty. In naming or constituting a court which is to render judgments limiting the rights of nations, we shall not be merely exercising the powers of sovereignty. What sovereign right has France to limit the sovereignty of Italy, of Great Britain? What sovereign right has Italy to name a judge to say if the power of France should be limited? From whence does this power come? From the sovereignty of Italy? It comes from consent, it has its origin in consent; not in the theory of sovereignty, not in the law of nations; it is purely conventional. The right of Italy to name a judge who can give decisions limiting the sovereign rights of France comes not from the sovereignty of Italy but from the consent of France.

So much for the equality which was alleged to rest in sovereignty. Pursuing the matter further and showing how the nations forsake sovereignty when they pass into the domain of consent in the appointment of a judge to pass upon their actions, Mr. Root continued: "As the function to be observed is a function not resting in sovereignty, but resting in consent, then, in determining whether the consent should be given mutually and upon what terms, we must consider not merely the theory of national equality, but the conditions and circumstances of the agreement which we are proposing to make."

As an illustration of the way in which nations take into account the greater interests which they may have in a subject-matter, Mr. Root called attention to the Universal Postal Union, in which the states divided themselves into seven classes according to the benefits which they expected to derive from the convention and according to their resources for bearing the expense. Austria-Hungary, France, Germany, Great Britain, Italy, Japan, Russia and the United States pay many times more than the smaller states. In the same way, and for a like reason, the League of Nations, Mr. Root thought, provided that the members

of the League should bear its expense in the proportions of the Universal Postal Union.

Equality, continued Mr. Root, obtains in diplomatic conferences, where the rule of unanimity prevails, but when the nations "submit anything to the determination of a majority, you have left the field of sovereignty and subjected yourself to the application of other considerations than those of the equality of states." Progress is not attained by the mere repetition that the purpose we have in mind is justice, and the mere agreement to obtain justice accomplishes nothing. "What we are to seek," he said, "is a practical means of so limiting the weaknesses, the passions, of so enlightening the ignorance and awakening the understanding of men engaged in the affairs of nations that there will be the highest possible probability of justice being done." And the fact that power is to be curbed merely divides the states into large and small states. It is not the power of Haiti or of San Domingo which is to be curbed, but the power of France, of Great Britain, of the United States: "We are not called upon by the general voice of the civilized world to make an effort towards the establishment of a court to curb the power of Norway; of Holland. The Great Powers, with their immense armies and navies, in the presence of which the smaller nations of the world feel that their lives are in danger unless justice prevails and a practical method of securing justice be agreed on, are to be curbed."

The conclusion necessarily flowing from these premises was that the court would curb the power of the great nations, on the one hand, and grant protection to the smaller nations on the other. This being the case, it also followed that the surrender would chiefly be made by the great states; that the small states would surrender practically nothing, but that they would get "protection, which," as Mr. Root aptly said, "the great Powers do not." In other words, "One is the group that is giving, another the group that is receiving, and you can not solve a question of that description which affects different states in a different manner, in which the states have different kinds of interests, by the application of the theory of the equality of states." It must be dealt with upon the basis of the realities to be affected, and, as Mr. Root said, "it is not reasonable to suppose that these great states will consent to have their power limited, to surrender of their sovereignty to a tribunal, the constitution of which is to be entirely within the control of the smaller states. The simple constitution of the court by a majority of equal states would place them in the hands of the smaller states who give little and get much, and always they would have the power to override the larger states which give much and get little."

Mr. Root next called attention to the fact that states could not be looked upon as mere abstractions, as though they were not composed of individual human beings, and that the progress of democracy makes the peoples of the different countries masters of the situation. The foreign offices may indeed negotiate, but the people decide, and because of this fact, a decision can not be accepted by foreign offices which will not be acceptable to the people. It is a fundamental principle of democracy, that the inhabitants of one country think their opinions are not less entitled to respect than the opinions of those in other countries. This being the case, he said, if you ask the one hundred million people of the United States "to consent to the sovereign rights of their country being limited in a court in which the one-half million in Honduras can outvote them, all the foreign offices in Christendom can never succeed in getting this recognized."

Then again, "there are backward nations, many quite shut up within themselves, some of them centuries back in political development," which have the least interest in the court. Yet, upon the theory of equality, they would have an equal vote with the more advanced, progressive and larger nations. Again, among some of the countries which would benefit by the theory of equality, and which would participate in the election of judges on an equal footing, are those in which the principle of exterritorality is still applied, and we would have the strange spectacle of these very nations determining the membership of a court before whose bar the larger Powers were to be summoned, when these Powers are unwilling to trust to the conception of justice obtaining in this class of countries and insist in having courts of their own for the trial of cases affecting their subjects and citizens. And then too, human nature being what it is, nations being what they are, nations might combine to secure the appointment of judges from certain states to the exclusion of judges from other states.

These two addresses by Mr. Root made a great impression upon the Advisory Committee, Mr. Hagerup saying, in the session of June 21st, that Mr. Root had suggested an idea which might serve as the basis of compromise; that this would indeed accord to the great Powers a formal and explicit preponderance; but that the system took account of the principle of equality in giving to all the Powers a vote in the Assembly, and in the Assembly the smaller Powers have the majority. This concession on the part of the large states, Mr. Hagerup felt, required a concession on the part of the smaller states; that this concession was to be found in the influence accorded to the Council; and that it was only along these lines that the solution could be found.

Lord Phillimore, following Mr. Hagerup, stated that he was very much impressed by Mr. Root's views as expressed in the session of the 18th, and that he had endeavored to state them in the following project of five articles, which he thereupon read:

> 1. The judges of the High Court are appointed by the joint authority of the Council and of the Assembly of the League of Nations.
>
> 2. The Council votes a list which is transmitted to the Assembly.
>
> 3. The Assembly considers the list voted by the Council and any names brought before it as candidates by any state which is a member of the Assembly and then votes its list.
>
> 4. The names which are found on both lists are then deemed to be elected.
>
> 5. As to the residue the Council votes afresh and the Assembly votes afresh and so they continue until a final agreement is reached.

Thereafter, the discussion centered about Mr. Root's method of appointing the judges. Reduced to the form of articles by Lord Phillimore, it was commonly called the Root-Phillimore Plan, just as at a later stage the various articles (including the method of appointing the judges) on the organization of the court presented by Mr. Root and Lord Phillimore, and upon which this part of the project is based, were called the Root-Phillimore Plan.

The Committee met on the 22nd with their minds inclined towards Mr. Root's proposal. Lord Phillimore had already accepted it without hesitation and without reserve and had reduced its main principles to articles. Mr. Hagerup had already signified his acceptance of the election of the judges by the concurrent action of the Council and the Assembly of nations, although he would have preferred the election by the Assembly, in which each nation met upon the basis of equality and had but one vote, rather than by the coöperation of the Council, in which the principle of equality was violated by the continuous representation of the large nations forming a majority of its members.

A proposal of Mr. Altamira presented to the Committee on the 22nd was based upon the participation of the Council and the Assembly in the election of judges. The project of the same date by Mr. Adatci likewise accepted the participation of these bodies, although to secure the permanent representation of the great Powers he proposed that five of the judges of the proposed court should be elected by the Council and eight by the Assembly. Mr. Justice Loder stated his acceptance of the method in an address made at the beginning of this session; and

during its course Mr. de Lapradelle also declared himself in favor of it.

It thus appeared that on the 22nd of June Mr. Root's proposed method had found favor at least with seven of the nine members then composing it, excluding Mr. Fernandes as he was only recognized later, toward the close of the Conference, as a member in place of Mr. Bevilaqua.

Mr. Justice Loder had been especially impressed by Mr. Root's address of the 21st, saying of the Root-Phillimore Plan, in a carefully prepared address which he read to his colleagues on the 22nd, "I should like to begin by complimenting Mr. Root on the speech which he made yesterday," and he continued with an admirably brief and accurate summary of that address which had produced conviction upon him and had assured a method of composing the court: "The equality of states is based on their sovereignty. Sovereignty is the right to be absolutely master at home to conduct all one's own affairs exactly as may seem best. But this in no way implies the right to mix in other peoples' affairs, and even to exercise a certain control over them. An election carried out by an electoral college which has the power to make decisions between sovereign states must be based on an agreement. This agreement is made by equal sovereign states, and the fact that it is an agreement in no way affects the equality. Consequently, the only difficulty consists in finding a method of carrying out this election which will defend the great states against the little, as well as the little against the great. The argument appears to me well founded."

Mr. Justice Loder then said, "Let us see if the project of Lord Phillimore, which outlines such an agreement, will meet the case." But before doing so, it is advisable to recur to a previous portion of Mr. Justice Loder's address in which he speaks of certain features of Baron Descamps' plan which seemed to him to be acceptable and which, as a matter of fact, were found acceptable not only to him but to the Committee. It is well to state these features in the language of Mr. Justice Loder, whose views on this occasion and the form in which they were put impressed his colleagues, tended to clear up the situation and to form the basis of the agreement upon the method of selecting the judges ultimately adopted by the Committee.

The fundamental idea of Baron Descamps' plan, Mr. Justice Loder said, attracted him very much.

This for two reasons: Firstly, because it evolves the new court from the work done at The Hague by the Peace Conferences. Also it entails a system of unification of the organization of international law throughout the world. It seems to me that the realization of this idea is very desirable. If I am not mistaken, Mr. Root has also expressed his adherence to this plan.

In the second place, I very much like the idea of giving an active part in the election of judges for the future court to such an important body of jurists, whose authority is so widely recognized. . . .

What pleases me in the system proposed by Baron Descamps is that he has found the best means of providing good candidates, but I do not agree when he gives the Assembly no part to play. It is a case where the saying "*sur vous, sans vous*" applies.

And in order to reinforce his view as to the rôle which the Assembly should play in the economy of the scheme, Mr. Justice Loder repeated the substance of an interview which he had recently had with Mr. Léon Bourgeois:

Do not forget that if you want to keep to practical methods, you must, whatever your system may be, give a more or less active rôle to the Assembly, for the Assembly is the body representing the nations themselves, according to the Covenant, the body which will have the final decision in the matter of the organization of the court, and it would never consent to be passed over when the election of the persons composing the court was under consideration.

Turning now to the Root-Phillimore Plan, Mr. Justice Loder said:

It seems to me there is no objection to the fundamental idea that there must be collaboration between the Assembly and the Council, but the method employed in the working out of this idea seems to me open to criticism.

The Assembly and the Council each prepare a list. Those who appear on both lists are considered elected. In reality, it does not appear likely that this would happen. The list of the Council in which the great states have a majority would probably only contain the names of the subjects of the great states.

The Council, knowing that the lesser states have a great majority in the Assembly, and naturally fearing combinations and intrigues, would try to insure the election of as great a number as possible of their representatives.

The Assembly receives the list of the Council and according to Article 3 of the project, adds to it all the names proposed by the different states and in this way the final list is prepared.

After this short statement, Mr. Justice Loder, with whom it is a duty to express his opinion freely and without reserve, whether it be favorable or unfavorable, then performed this duty:

What pleases me in the proposal made by Lord Phillimore is that he gives the decision to the two principal bodies of the League of Nations, and he intends them to work together for the common good in the formation of the most important institution of the League.

That which does not please me is that he has opened the door

wide to political intrigues, and that his project gives no security or even probability that the persons who ought to be elected, will obtain the places to which they are entitled.

To preserve the good of the Root-Phillimore project, and to eliminate from it what he conceived to be the possible defects, Mr. Justice Loder advocated the acceptance of certain features of the plan proposed by Baron Descamps. "Who is more likely," he said, "to know the great jurists, who are also great men, trained in public affairs and capable of being entrusted with the task of administering justice, than the body of international arbitrators?" This question he answered indirectly in the following manner:

It should therefore be their task to compose a list of candidates, or states may be given the right of making recommendations to them; it may be laid down that the list of names recommended by them should be accompanied by a list of refused names; they may be given the task of adding comments to the names recommended as well as to those refused. But the list prepared by them must be *the* list, the definite list, outside of which no selection may be made.

This list should be presented to the Assembly and the Council.

Now let us set in motion the electoral machine contained in Lord Phillimore's proposal. Now let the two bodies try to come to an understanding on the selection to be made from these candidates, which have at least been prepared by a competent body, which can not be suspected of any ulterior motive.

In this way it seems to me we shall have accorded to the principal institutions of the League that which is due to them, and they will have been prevented injuring the world by their incapacity or ill-will; by their intrigues and conspiracies.

Immediately upon the conclusion of Dr. Loder's carefully prepared address, Mr. de Lapradelle, after examining and rejecting Baron Descamps' proposition to have the Permanent Court of Arbitration elect the judges of the Permanent Court of Justice, accepted in principle and amended in detail Mr. Root's method of electing the judges by the concurrent action of the Assembly and Council.

Baron Descamps' plan, he said, "tends to reëstablish the historical connection which was broken by the Covenant of the League of Nations when it set up a new international organism without considering institutions already in existence. The idea connects the future with the past on the basis of the work of 1907. It has also the advantage of providing for the coexistence of the new court and the old Court of Arbitration." The plan had a further advantage in that it protected in fact the equality of states.

But on the other hand, Baron Descamps' scheme was open to two serious objections: first, the members of the Court of Arbitration were "only half jurisconsults, the other half politicians"; secondly, election of the judges by the Court of Arbitration would make the Court of Justice depend upon the Court of Arbitration. "The Court of Arbitration and the Permanent Court," he rightly said, "must be two parallel and independent institutions with different tasks. They must not overlap nor must they draw their authority from the same source." Mr. de Lapradelle, therefore, felt obliged to reject Baron Descamps' plan and to give his adherence to Mr. Root's method which had "the great advantage of satisfying the susceptibilities of those who wished to see realized the principle of the equality of states and of those who wished to give a special influence to those states which have made the greater sacrifices to the cause of justice." He foresaw, however, a possiblity of disagreement between the Assembly and Council which should be obviated, inasmuch as the Assembly represented the equality of states, the Council the specially privileged states. Before stating his amendment, he expressed the opinion that, in order "to obtain as much advantage as possible from the principle laid down by Mr. Root," the judges should require for election a two-thirds majority in the Assembly and Council. In such a case, a deadlock might occur if the joint commission of three members from each of these bodies might not be able to agree, or if the Assembly and Council might not accept its report. At this point Mr. de Lapradelle proposed recourse to "a special commission appointed beforehand from among the members of the Court of Arbitration." In subsequent elections, when it was only necessary to fill vacancies by the selection of a judge or two, the court itself might elect. By such a method as this, he thought that the Assembly and Council could be forced to agree, and he felt it was right in creating an organ to form part of the League of Nations, that "the election should be entrusted to the two chief organs of this League."

Thereupon Mr. Root read to the Committee the following memorandum which he had prepared and in which he had incorporated the views which he believed to be held by various members of the Committee, humorously saying that he claimed no copyright upon it, and admitting that it was "stolen property":

1. Election by Assembly and Council.
2. Qualifications of candidates to be judicial eminence and character.
3. List of persons deemed to be qualified to be furnished before meeting of Assembly by the members of the Permanent

Court of Arbitration at The Hague—the members appointed by each nation to propose not less than two nor more than four names, one-half to be from nations other than that by which the proposals are appointed.

4. Votes on the list thus formed as provided by Lord Phillimore.

5. As far as vacancies may remain not filled by election from this list other names may be proposed by the Assembly and Council to be considered and voted upon in like manner.

6. In all elections all electors to be under honorable obligation to regard the qualifications and to seek adequate representation in the court for the different systems of jurisprudence existing among civilized peoples.

In explanation of his memorandum, Mr. Root stated that he assumed two fundamental propositions: "That the Permanent Court of Arbitration at The Hague, which now exists, should remain, not be superseded, and that the new court should form a part of the judicial system of which the old court is a part." He then proceeded to point out that the disputes between nations were of varied kinds and that there would be a need for each institution, the one to administer law in the strict sense of the word, and the other to do justice in a large and untechnical sense. "There are four different functions to be allotted to these two different judicial institutions:

"1. To determine questions of strict law and questions arising from contracts.

"2. To determine questions depending upon the principles of justice applicable in the absence of rules of strict law or contract provisions.

"3. To determine facts which are unknown or are disputed.

"4. Conciliation."

Having thus defined from the nature of the controversies the sphere and need of each tribunal, Mr. Root proceeded to advance reasons which in his opinion made a participation of the Permanent Court of Arbitration advisable in the formation of a new court,—a participation in the selection of judges, not in their election, as the election of officers or magistrates should proceed from political power, that is, from the states themselves.

"I think," he said, "that the participation of members of the Permanent Court of Arbitration is very desirable, because we have in that list men who are recognized in each country as being specially familiar with the subject with which the court is to be familiar, and with the personnel in other countries which are interested. . . .

"I think that the participation of the members of the Permanent Court of Arbitration rather comes at the beginning than at the end as suggested by Mr. de Lapradelle. If it comes at the end it would be as arbitrators to determine a difference between the Council and the Assembly.

"It is only the final decision which is important. The pressure of necessity will be more valuable than the power of decision by someone else. The legislation of the world practically is accomplished in the same way; differences between two opinions are reconciled under the pressure of necessity; there must be a law on such and such subject, and the advocates of the opinions which differ are compelled to reconcile their differences, because there must be a law. Here must be justice, and if electors do not agree they are condemned for incapacity. If the members of the court have the opportunity to propose this list, the origin of it will be a guarantee of qualification, and if the electors can not agree upon one named, the opportunity to propose names outside the list will guarantee that someone be found."

Passing to the sixth and last of the headings contained in the memorandum, which really was based upon the instructions which he, as Secretary of State, gave to the American delegates to the Second Hague Peace Conference, he said, and thus concluded his remarks on this occasion:

I think that the last proposal, that in all elections the electors are under an honorable obligation to regard the qualifications stated and to seek adequate representation on the court for the different systems of jurisprudence, I think this is a view in which we all agree, and it seems to me that that includes valuable ideas that have been proposed by a member of the Committee.

The attempt of Mr. Root to harmonize the different views expressed by the Committee appeared to have succeeded. Baron Descamps, however, was still in favor of having the judges elected by the members of the Permanent Court, instead of having a list prepared by them, and he preferred the intervention of the Assembly to that of the Council, the Assembly recognizing the equality, the Council the inequality of states. But although he failed to have the new court spring from the Permanent Court of Arbitration in the sense that the members of that body should appoint the judges, he was in the end successful in procuring a unanimous opinion of the Committee for the maintenance of that institution and its participation in the selection of judges, for without the continued existence of the Permanent Court of Arbitration, the list of judges can not, according to the system actually adopted, be prepared, as it is to be prepared, by the Court of Arbitration. "The Conference at Paris," he said, "was wrong in presenting the Covenant to the world as a new

Gospel and the Permanent Court as an institution new in every respect. As justice had not been done to the institution at The Hague, the members of the Committee must now make good this injustice." But he congratulated the members upon having recognized "that the new court and the Court of Arbitration are bound together."

The other dissenting voice was that of Mr. Ricci-Busatti, who, like the president, not only wished to maintain the present Court of Arbitration, but, differing from the president, to constitute the proposed Court of International Justice upon substantially the same principles, thus preferring a series of temporary tribunals to a single permanent Court of International Justice. He admitted that the Court of Arbitration only consists of a list of judges, and that this fact explains the infrequent use which has been made of that court. He thought, however, that the new court should consist of a shorter list of judges taken from the list of arbitrators, and that from this new list the judges should be chosen to sit in a particular case. He was also in favor of assuring an adequate representation of the different judicial systems, and the selection of the judges of the court from a list would have, he said, "the advantage of allowing judges to be chosen who possess special qualifications for the particular case; for it must not be forgotten that the new court will be called upon to try cases coming from all parts of the world and that, under these circumstances, no member can be qualified to deal with all cases."

The members of the Advisory Committee had, after much hesitation, made up their minds. Various plans had been proposed, considered and found wanting. Mr. Root's plan offered a way out with a vista of a Permanent Court of Justice on the horizon. A little patience, a little more time and the Committee would be unanimous.

The situation at the end of the session of June 22nd, after which the Committee passed to other questions, to return to the composition of the court at a later period, was admirably stated by Mr. Hagerup, who said, according to the official minutes—

He was convinced that a solution could only be reached by mutual concessions. A basis for discussion must be found. He did not think that such a basis could be found in either the president's or his own or Mr. Ricci-Busatti's schemes. The only plan that seemed to him to offer such a basis was Lord Phillimore's [the Root-Phillimore Plan]. He thought therefore that this was the basis for them to take, and that they should proceed to come to an understanding on points that were not clear. Though he was a jurisconsult, it did not go against his conscience to give the Council a share in the election of judges. There were however objections to this. The Council was not popular

throughout the world; it might be dangerous to give it too much power. However, states have joined the League of Nations, although not without some hesitation, and the best use possible must be made of its various institutions. The establishment of the Permanent Court is one of the chief steps in this direction; to achieve this, he personally was prepared to make concessions. The balance could never be absolutely adjusted; it must be weighted down to one side or the other.

Continuing, Mr. Hagerup said that it was impossible to achieve the ideal; if compromises were not effected, the Committee would fail. He, therefore, called upon the members to abandon some of their cherished hopes and to take for a basis the Root-Phillimore Plan, which seemed to him "the only possible solution."

In the interval between the 23rd of June and the 5th of July, the discussion turned upon the question of jurisdiction, in regular sessions, and questions of procedure in unofficial and unreported sessions.[24] During this period Lord Phillimore and Mr. Root cast in the form of articles their views both as to the appointment of judges and the composition of the court and its jurisdiction, incorporating therein the views of other members of the Committee which had found general favor. This was the so-called Root-Phillimore Plan. It was the basis of discussion later and, with sundry additions and in some cases omissions, forms the foundation of the articles of the project dealing with the composition and jurisdiction of the proposed Permanent Court of International Justice.

On the 6th of July, according to an agreement reached the day before, the Committee proceeded to vote upon the different methods of selecting the judges. The first amendment to be voted upon was that of Mr. Ricci-Busatti, which was a substitute prepared that day for the methods of selecting the judges contained in his projects of June 23 and June 30. This amendment was as follows:

Each member of the League of Nations, contracting parties to the Convention of The Hague for the pacific settlement of international disputes, shall have the right to name one judge chosen by its delegates at the Permanent Court of Arbitration, either from among its nationals or from among the nationals of a different state. If these delegates are not agreed in their choice of a person, the government shall designate the person whom it prefers from among those whose names have been proposed.

As soon as the judge shall cease for any reason whatsoever to be a member of the court, the state by which he was named shall pro-

[24] In the latter, the undersigned, at Mr. Root's request, took his place.

ceed to a new appointment in accordance with the preceding paragraph. . . .

The court shall meet in full session every two years, and shall be divided into five sections. Each section shall be composed of a president and a number of judges and deputy judges to be determined according to circumstances, by the court itself, the individual ability and nationality of each judge being taken into consideration. No judge may belong to more than two sections.

The presidents of the five sections are elected by the court by absolute majority. If this majority is not obtained on the first ballot, a simple majority shall decide. In case of a tie the senior shall be considered as elected. Their college shall form the "Presidency of the Court."

Mr. Ricci-Busatti admitted that his amendment constituted a new plan which differed considerably from his first, and that the new proposal resembled the plan submitted by the Italian delegation to the Paris Peace Conference. His fundamental idea was to join the proposed court to the Court of Arbitration and to insure its independence by excluding political influence. He felt that political bodies like the Council and the Assembly would always vote by countries and would not consider persons with whose merits the members would not be well acquainted, so that the result would be that the judges appointed by these bodies would never be independent, and that they would always consider themselves as representatives of states. Under these circumstances, he had proposed a court of some forty-five to fifty members appointed by the various states, which would be divided into five to seven sections. The presidents of these sections, elected at a full meeting of the court, would form a presidential body which would be, in his opinion, the nucleus of a court, the election to be carried out by men who knew each country and would be more likely to insure the election of desirable persons.[25] In reply to a request from Baron Descamps for further information as to the working of this plan, Mr. Ricci-Busatti stated that his amendments were based upon the ancient *Rota Romana*, a body which was permanent in the sense that judges composing it sat in rotation. With this institution in mind, he conceived the idea of forming a college divided into sections with a permanent presidential body. These different sections could be composed in such a way as to be especially competent to deal with certain classes of cases, as a judge could not be expected to be equally competent to deal with all classes of cases. The parties in controversy should have, in his opinion, the right to choose the section which would deal with these

[25] *Procès-verbal* for session of July 6th.

cases.[26] In reply to three questions put by Mr. de Lapradelle, which went to the heart of permanency of the court: Did Mr. Ricci-Busatti think that his system would insure the permanence of the court? Did he think that it would insure the unification of jurisprudence? Did he think that the system would give the nations a court such as public opinion expected?—Mr. Ricci-Busatti answered that the permanence of his court was assured by the permanent nucleus of the presidential body, that the unification of jurisprudence would be insured by his system just as effectively as by any other, and that a court constituted in accordance with his ideas would fulfil the wishes and expectations of nations. A court such as he proposed would be founded upon realities, while in some of the other systems there was an artificial element.[27] Mr. Ricci-Busatti's proposition, as thus explained by himself, was put to a vote and was rejected by a vote of six to two, with one abstention: Messrs. Adatci, Altamira, de Lapradelle, Loder, Lord Phillimore and Mr. Root against; Baron Descamps and Mr. Ricci-Busatti for. Mr. Hagerup did not vote, because, as Mr. Ricci-Busatti's proposition had only been presented that morning, he had not had time to consider it.

This vote decided that the contemplated court was to be a permanent body, and that it was to be a court of justice, not of arbitration.

The Committee next took up Baron Descamps' proposition for electing the judges and constituting the court. Baron Descamps' amendment to the Root-Phillimore Plan was Article 5 of his elaborate project laid before the Committee subsequently to the presentation of the Root-Phillimore Plan, which, adopting many of its provisions, rejecting others, proposed a radically different method of appointing the judges. Article 5 of this plan is as follows:

> The members of the court are elected by the Assembly of the League of Nations from a double list of candidates, one presented by the Council of the League, the other by a college of delegates of the Permanent Court of Arbitration under the following conditions:
>
> Three months before the date of the election, the Secretary General of the League of Nations shall request, in writing, the group of delegates appointed to the Permanent Court of Arbitration by each state to name one of its members.
>
> The first duty of this person is to consult the highest courts of justice, the university of law faculties, the academies or branches of academies devoted to the study of law, as well as

[26] *Procès-verbal* for session of July 6th.
[27] *Ibid.*

other great institutions in the juridical world of recognized merit, and to receive the names of persons combining the qualities necessary to act as a member of the court and free to take up an appointment.

The College of members thus chosen from the Permanent Court of Arbitration shall be convened at The Hague two months before the date of the elections, by the Secretary General and shall proceed to the discussion of the candidates submitted by its members, and to the preparation of a list of candidates double the number of the vacancies to be filled. This list shall be prepared in such a way that the judges and deputy judges shall be drawn from various states and that the great forms of civilization and the principal systems of jurisprudence in the world be represented as far as possible.

The members of the College, prevented from taking part in the meeting may each send two names together with the reasons for their recommendations.

The College shall determine rules governing the method in which it will exercise its powers, following the conditions here laid down.

The list of candidates drawn up by the College shall be communicated without delay through the Secretary General to the Council of the League of Nations, and this body, after taking steps to gather all necessary information, such as the consultation of great institutions of international jurisprudence, shall proceed in accordance with the procedure adopted by it to prepare a list of candidates twice the number of the appointments to be filled.

The Assembly of the League of Nations shall proceed in its turn to elect the judges from the double list submitted to it, and to elect the deputy judges in conformity to such rules as it shall itself adopt, under such conditions that each state described as principal Power in the Covenant of the League of Nations shall have a titular judge in the court as representing one of the principal juridical systems of the world.

The last clause of Article 5 had been added that very morning, in order to quiet the apprehensions of the great Powers by assuring to them permanent representation in the court, not on the ground of their largeness, but on the ground of their systems of law. Baron Descamps had insisted consistently from the opening of the conference that the adoption of his principle would insure the larger states permanent representation, whereas the method of election did not so assure them. However, the large Powers did not insist upon an absolute guarantee. In reply to a direct question put by Baron Descamps as to whether the election by the Council and the Assembly was an absolute guarantee, Lord Phillimore frankly admitted that it was not a positive guarantee,

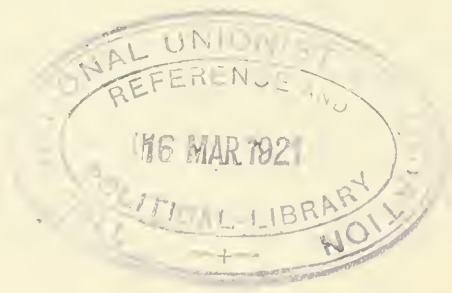
but finely said that it was "a reasonable" guarantee. Put to the vote, Baron Descamps' proposition was rejected five to three, with one abstention: Messrs. Adatci, de Lapradelle, Loder, Lord Phillimore and Mr. Root against; Mr. Altamira, Baron Descamps, Mr. Ricci-Busatti voting for; Mr. Hagerup not voting.

This vote meant that if either of the two agencies of the League of Nations was to be resorted to in electing the judges, both agencies, that is to say, the Council and the Assembly, were to be utilized upon a footing of absolute equality.

The projects of Mr. Ricci-Busatti and Baron Descamps in so far as the election of judges was concerned, having been rejected, the Root-Phillimore Plan, to which there were amendments, was now before the Committee to be accepted or rejected as an original proposition. This proposition was that the judges should be elected by the Assembly and the Council of the League of Nations, that each of those bodies should vote separately and that the votes of a majority of the members present and voting in each body should be necessary to an election. Mr. de Lapradelle suggested before the vote that the clause in question should be divided so that the vote should be upon the principle and not upon the detail. This was agreed to, and upon the question that the judges should be elected by the Assembly and the Council of the League of Nations the vote stood eight to one: Messrs. Adatci, Altamira, Hagerup, de Lapradelle, Loder, Lord Phillimore, Ricci-Busatti and Root voting for; Baron Descamps against.

This vote meant that the Advisory Committee would ultimately recommend a method of electing the judges by the joint and equal action of the two organs of the League of Nations which were to pass upon the project.

In the course of one of Mr. Root's addresses, he used the old English adage: "Leg over leg the dog went to Dover." It not only reached Dover, but, as will be seen, crossed the channel to The Hague.



## PROJECT FOR A PERMANENT COURT OF INTERNATIONAL JUSTICE

### Article 1 (Preamble)

> A Permanent Court of International Justice, to which parties shall have direct access, is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This court shall be in addition to the Court of Arbitration organized by the Hague Conventions of 1899 and 1907, and to the special tribunals of arbitration to which states are always at liberty to submit their disputes for settlement.

The first article of the project which is in the nature of a preamble, indicates the progress which has already been made in the pacific settlement of international disputes by means of arbitration, and that arbitration is to be supplemented, not to be replaced by judicial settlement. It further indicates that agencies to facilitate the recourse to arbitration, whether they be special tribunals or tribunals of the Hague Court of Arbitration are to continue to operate in the future as in the past, if it be the desire of states to use them.

The field of peaceful settlement is to be enlarged, or rather a new agency is to be created in this field, to the end that disputes which parties may wish to have settled by due process of law, that is to say, by the application of the principles of justice which we call rules of law, may be submitted to a court of justice, instead of a special or temporary tribunal of arbitration, to have them settled "on the basis of respect for law."[1]

To the new institution the contending parties are to have direct access. It must, therefore, be permanent, not constituted for the case, as is a special tribunal of arbitration or the temporary tribunal of the Hague Court of Arbitration. The judges are therefore to be appointed in advance of the case, not chosen by the parties to the dispute after it has arisen, as is the wont of arbitration.

There are thus three agencies recognized by Article 1, to which states are at liberty to submit their disputes for settlement, and each agency is a step in advance, culminating in a Permanent Court of International Justice.

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[1] Pacific Settlement Convention of 1899, Article 15.

## CHAPTER I

### *Organization of the Court*

#### Article 2

> The Permanent Court of International Justice shall be composed of a body of independent judges elected, regardless of their nationality, from amongst persons of high moral character, who possess the qualifications required, in their respective countries, for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Having decided in Article 1 to establish a Permanent Court of International Justice, Article 2 passes to a consideration of the qualifications which the judges of the proposed court should possess. No question could be more important; none was discussed at greater length by the Committee, and upon none was there a more complete unanimity. The goal was clear and within the view of every member; but the means of attaining it disclosed much difference of opinion. It is of the essence of a court that its judges be independent, and justice cannot be expected unless they are so in fact as well as in theory. The Committee contented itself in this connection with a statement of principle, reserving for Article 16 the means to secure and preserve independence from governmental interference or influence. As a means to this end, the judges are by Article 2 to be elected "regardless of their nationality." This can not be understood in the sense that nationality is not to be considered, inasmuch as Article 10 provides that not more than one judge can be elected from one and the same nation. It means that no person is to be chosen because he is a citizen or subject of some preferred country. It is to be expected that a distinguished French jurist or publicist will be appointed, but neither France nor any other Power has or is to have of right a judge to sit in the court. Nationality is, however, admitted under certain conditions and limitations. For example, it is specifically provided in Article 28 that in case one of the parties in controversy has a judge upon the bench, the other litigating party may appoint a judge to take part in the trial and disposition of the case to which it is a party; and in like manner if neither of the litigating parties is represented upon the bench, each shall have the right to appoint a judge during the trial and disposition of the case. This provision, however, is not inconsistent with the general proposition laid down in the present article that the judges are to be elected regardless of nationality, as each litigating party must be

treated alike, and the choice of a judge, even regardless of nationality, must not in the mind of the litigating party, or in the view of the world at large, seem to inure to the advantage of the state represented on the court and to the disadvantage of the state not so represented.

Mr. Altamira repeatedly expressed the view in the proceedings of the Committee, that the success of the court would depend upon the quality of its judges, and that moral qualities had more importance than scientific ability. The selection of the judges best qualified would, he believed, eliminate the question of great and small Powers, because, as he said, "great Powers, as they have a more developed civilization, will also naturally have a larger minority of intellectual men amongst their population." From this he drew the conclusion they would always be sufficiently represented on the court "if the principle of choosing the best men is maintained," and that he, himself, was prepared to accept any scheme concerning the election of judges taking as its basis the necessity of choosing the best regardless of their nationality.

That the judges should be persons of high moral character only needs to be stated.

Hitherto, Article 2 deals with what may be considered as general qualifications: the judges are to be independent, they are not to belong to any particular nationality and they are to be persons of high moral character.

The balance of the article deals with what may be called particular qualifications, and it will be observed that they are stated in the alternative; that the judges shall either be eligible for appointment to the highest judicial offices, or that they shall be jurisconsults of recognized ability in international law. These qualifications gave rise to no little difference of opinion, and were the subject of much discussion.

The English-speaking members insisted upon mentioning specifically that persons occupying high judicial offices should be eligible for appointment, and they did not look with favor upon the appointment of persons versed only in international law. In the session of June 18, 1920, Lord Phillimore said: "Good judges are required—not merely jurisconsults. A great jurisconsult is not necessarily a good judge. A judge must possess the qualities of loyalty, high moral character, open-mindedness, courage and patience." And Lord Phillimore believed that persons possessing these qualifications could only be found among persons trained in law, seasoned by experience at the bar, and, if possible, by experience upon the bench in their respective countries.

On the other hand, various members from the Continent, particularly the French member, objected to the mention of this class of per-

sons, inasmuch as anybody having taken his law degree in his country was eligible to the highest judicial positions, without any training in international law, with which system the judges of the proposed court should be familiar. Naturally, he was in favor of jurisconsults familiar with international law, although generally such persons would not have occupied judicial positions in their respective countries. The result was that these alternative provisions, based upon Article 2 of the Draft Convention of 1907 for the Court of Arbitral Justice, were adopted with the strengthening of the first in form if not in substance, by requiring that the persons appointed should meet the conditions for appointment to the highest judicial offices.

ARTICLE 3

> The court shall consist of 15 members: 11 judges and 4 deputy judges. The number of judges and deputy judges may be hereafter increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of 15 judges and 6 deputy judges.

It can not be truthfully said that the court should consist of any given number of judges, but there are certain considerations which tend to determine the number within narrow limits. The Permanent Court of Arbitration of 1899 permits each nation to appoint not more than four persons. Supposing that there are 50 nations forming the Society of Nations and parties to the Pacific Settlement Convention creating the Court of Arbitration; and, supposing further, that each nation exercises its right of appointment to that court, we have a body of 200 members. This may be a judicial assembly; it is not a court. Should each state curb its appetite for judges and restrict itself to one, we would have 50, a body approximating a judicial assembly rather than a court. On the other hand it must not be forgotten that we are dealing with nations, and that we are asking each nation to submit the legality of its actions, in so far as they affect another nation, its citizens or subjects, to the standard of law interpreted and applied by a court of justice. Each nation would feel more confidence in the court if one of its upright and trained jurists sat in that tribunal during the trial and consideration of its case. This can fortunately be accomplished without having the court always composed of a judge from each country, by the simple device of allowing each nation, should it so desire, to appoint a person possessing all the qualifications of a judge to sit upon the bench during the consideration and trial of the case in which it is interested, provided that there is not a judge of its nationality in

the court as composed in the first instance. This enables the number to be reduced below 50, without withdrawing from the court the confidence of each nation in it at the very moment in which that confidence is most essential.

The court, however composed, should be large enough so that the judges belonging to nations in litigation may be able to enlighten the other judges as to the law involved, whether it be national or international, but not to exercise a determining influence upon the judgment of the court, as might be the case if the number of judges were very small. Again, the number of judges need not be so small as in the case of a national court. The international tribunal, while it deals with international law, must or should be familiar with the typical systems of law existing in the world at large, inasmuch as every case, although it is to be decided by principles of international law, nevertheless has had its origin in a national act, which may or may not be in accord with the laws of that particular state. The larger the number of judges familiar with national systems, the more fitted the court for the performance of its duties. The number becomes therefore material, differing in this respect from a national court, each judge of which has had approximately the same training in the same system of law and possesses approximately the same qualifications. A tribunal of arbitration ordinarily consists of five members, of which two are generally citizens or subjects of the parties in controversy. The indifferent members are indeed in a majority, but the majority is too small. On the other hand, a court of more than fifteen judges is considered by many competent persons to be unwieldy.

The Advisory Committee endeavored to strike a balance on the understanding that the number of judges might be increased from time to time as some states not now members of the League of Nations and others not yet fully recognized as states, should be included. The countries in the minds of the Committee were chiefly Germany, Russia and the United States. The Advisory Committee, therefore, recommended that the court begin with eleven judges and four deputy judges, and that this number may be increased to a total of fifteen judges and six deputy judges. The French text is in this regard more specific than the English version, inasmuch as the word "titular" is used in that language to designate the regular, actual or sitting judge, and the word "supplemental" or supplementary, for the occasional judge. Deputy or supplementary judges do not exist in the Anglo-American system. They do in other systems, and fill a temporary or permanent vacancy in the court according to the provisions of law of the different nations

having such a system. It may be said in this connection, although it will be dwelt upon later, that the qualifications of titular and deputy judges are to be the same, and that the order in which the deputy judges shall be called upon to act as judges of the court is determined by the court itself according to the provisions of Article 15 of the project.

It will be observed that the number of judges is to be increased by the Assembly upon the proposal of the Council of the League of Nations. The project in all its parts rests upon the coöperation of the Assembly and the Council, the initiative ordinarily being taken by the Council, which is a smaller and may be said to be an executive body, meeting frequently, if not at regular intervals; whereas the Assembly represents the members of the League upon a footing of equality, each member having a right to one vote, although it may have as many as three representatives. This body represents all nations which are members of the League, not a limited number of them, and therefore can speak and act in behalf of all.

### Article 4

> The members of the court shall be elected by the Assembly and the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

The term "members of the court," used in the project, means titular as well as deputy judges, both of whom are to be elected by the Assembly and the Council sitting as equal, independent and separate bodies. In theory, the Council represents the League. In fact, unless human nature has changed, the Council represents primarily the nations seated at the council table. This, indeed, was the reason for the separate action of each body. The Assembly, composed of representatives of all the states, represents the general as distinct from special interests. The Council, of which a majority is composed of the so-called great Powers, is expected to be mindful of the interests of its majority. These interests have been supposed to be opposed in the past. It was admitted that the general and special interest should be considered, but that neither should prevail; that the Assembly, composed of an overwhelming majority of small states, would veto an improper exercise of power on the part of the Council; that the Council would veto an improper exercise of power on the part of the Assembly, so that by the separate, independent and concurrent action of each body, a compromise would be reached after consideration of the divergent points of view of the great and the small Powers, if their points of view should be found to be

opposed in the election of persons possessing the necessary qualifications for judges of the proposed court.

While, however, the Assembly and the Council are to elect the members of the court, as it is only from the source of political power that judges obtain the right to decide, it does not follow that governments should in first instance select as well as elect the members of the court. There is reason to believe that a nation would find it difficult to withdraw its support from a person whom it had proposed as a judge, and, having committed itself, it might be inclined to take such action as in its judgment would be calculated to secure the election of the person to whom it had committed itself. On the contrary, it is believed that a nation would be prepared to consider a list of eligible persons with more openness of mind if they had been selected by a body in whose composition the nation had indeed participated, but which is not a mere committee or agency of the state for this sole purpose.

It has been mentioned a number of times that each nation a party to the Pacific Settlement Convention has the right to appoint not more than four persons to be members of the Permanent Court of Arbitration at The Hague. It is to be presumed that the persons so appointed possess their confidence, as they are held up by the appointing nation as persons fit and qualified to decide disputes between nations. It is also to be presumed that the country appointing these members would attach a value to their opinions as to persons who could properly form a permanent court of justice for the decision of differences between states. It might even be that a government might discuss with its members the question of fitness of one or more persons for appointment, but the recommendation of the members of the Court of Arbitration of each country would nevertheless be the recommendation of those members as such.

It is believed that the preparation of the list of available persons by the national groups of the Court of Arbitration of the various countries taking part in the election of judges is a guarantee to the world at large of the qualifications of the members proposed; that the rights of the nations are sufficiently safeguarded in that the recommendation proceeds from a body of persons possessing the confidence of the governments, and that, in last instance, the governments themselves, in the fullness of knowledge of the qualifications of the candidates and after mature consideration, elect the persons to whom they are willing to entrust the decision of their controversies.

ARTICLE 5

> At least three months before the date of the election, the Secretary General of the League of Nations shall address a written request to the members of the Court of Arbitration, belonging to the states mentioned in the Annex to the Covenant or to the states which shall have joined the League subsequently, inviting them to undertake, by national groups, the nomination of persons in a position to accept the duties of a member of the court.
>
> No group may nominate more than two persons; the nominees may be of any nationality.

As the national groups of the Court of Arbitration are to select the lists of persons from whom the judges shall be elected, it necessarily follows that they must be requested to prepare and to present their lists. The Secretary General of the League is the proper person to inform them, which he is made to do by Article 5 at least three months before the date fixed for the election.

The only states having a right to appoint members of the Permanent Court of Arbitration are those which are parties to the Pacific Settlement Convention. As a consequence of the World War, states have come into being which did not exist before the war. None of these nations are parties to the Pacific Settlement Convention, yet some of them, such as Poland and Czecho-slovakia, are already members of the League, including the enlarged Serbia called the Kingdom of the Serbs, Croats and Slovenes. Before they can comply with the request of the Secretary General of the League of Nations to be addressed to their members of the Court of Arbitration, it will be necessary for such states to become parties to the Pacific Settlement Convention, which provides for the adherence of Powers not represented in the First Peace Conference or not invited to the Second Conference. Article 60 of the Convention of 1899 provided that the conditions of adherence should form "the subject of a subsequent agreement among the contracting Powers." In 1907 the Powers accepting the invitation to participate in the Second Conference, which, however, had not been invited to the First, were allowed by the contracting parties to adhere to the convention upon the sole condition of signing it. They did that at The Hague, June 14, 1907, the day before the formal opening of the Second Conference. The like procedure can be followed in the present case.[2]

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[2] Protocol regarding adhesions to the 1899 Convention for the pacific settlement of international disputes, signed at The Hague, June 14, 1907:

The Powers which have ratified the Convention for the pacific settlement of international disputes, signed at The Hague on July 29, 1899, desiring to enable

Under the Pacific Settlement Convention each contracting Power is entitled to nominate not more than four members of the Permanent Court of Arbitration. May each national group submit a list of as many persons for membership in the Permanent Court of International Justice? No, says Article 5, which limits the number to two.

There was a wide divergence of views as to the number of persons which each national group might recommend. The most reasonable view, it is believed, was that of Mr. Root, who proposed that each national group should select four persons, two of whom should be citizens or subjects of the national group, and two citizens or subjects of foreign countries. In this way, each national group would have been obliged to express its opinion upon two persons of foreign nationality qualified to act as international judges. Recommendation would have been in many cases tantamount to an election, inasmuch as the qualified per-

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the States that were not represented at the First Peace Conference and were invited to the Second to adhere to the aforesaid Convention, the undersigned delegates or diplomatic representatives of the above-mentioned Powers, viz: . . . duly authorized to that effect, have agreed that there shall be opened by the Minister of Foreign Affairs of the Netherlands, a *procès-verbal* of adhesions, that shall serve to receive and record the said adhesions, which shall immediately go into effect. In witness whereof the present protocol was drawn up, in a single copy, which shall remain in deposit in the archives of the Ministry of Foreign Affairs of the Netherlands and of which an authenticated copy shall be transmitted to each one of the signatory Powers.

[Martens, *Nouveau recueil général de traités*, 3rd series, Vol. II, p. 4: *The Hague Conventions and Declarations of 1899 and 1907*, J. B. Scott, editor (1918), p. xxxii.]

*Procès-verbal of adhesion:*

There was signed in this city on June 14, 1907, a protocol establishing, in respect to the Powers unrepresented at the First Peace Conference which have been invited to the Second, the mode of adhesion to the Convention for the peaceful settlement of international disputes, signed at The Hague, July 29, 1899.

Pursuant to the said protocol, the undersigned, Minister of Foreign Affairs for Her Majesty the Queen of the Netherlands, on this day opened the present *procès-verbal* intended to receive and furthermore to record, as they may be presented, the adhesions of the aforesaid Convention.

Done at The Hague, on June 15, 1907, in a single copy, which shall remain in deposit in the archives of the Ministry of Foreign Affairs of the Netherlands, and of which a duly certified copy shall be transmitted to each of the signatory Powers.

VAN TETS VAN GOUDRIAAN.

*Successively adhered:* Argentine Republic, Brazil, Bolivia, Chile, Colombia, Cuba, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Venezuela, Uruguay, Salvador and Ecuador.

[Martens, *ibid.*, p. 6; Scott, *ibid.*, pp. xxxii-xxxiii.]

sons, not too numerous in any event, would figure upon many lists, and the Council and the Assembly would necessarily be guided in election by the frequency with which foreigners appear upon national lists. Mr. Root, however, was willing that the national group should propose as many persons as it pleased, leaving the Assembly and the Council free to pick and choose among them. Baron Descamps was much opposed to a large list, on the ground that it would tend to confuse the Assembly and the Council. Mr. Hagerup, on the contrary, strongly favored a large list, to the end that the electoral bodies should have before them a wealth of material from which to make their choice. He, however, yielded to the arguments of his colleagues and agreed to limit the number to be presented by each national group to six. Eventually this was cut down to two, against his opposition and vote.

It will be observed that there is no requirement of nationality in the text as ultimately adopted; a national group may recommend two from its country or it may content itself with one, or, indeed, with none, preferring foreigners of eminence. A great deal of stress was laid on this latter possibility, especially by Mr. de Lapradelle, who felt that some of the smaller states might prefer to recommend foreigners instead of their own nationals. Time will tell. Each national group is to recommend two qualified persons; they are to be persons of their own choice, whether they are or are not citizens or subjects of their own country.

### Article 6

> Before making these nominations, each national group is hereby recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

It would seem that an article requesting the national groups of the Permanent Court of Arbitration to strengthen their judgment by the advice of sundry specified bodies of persons interested in international law, international organization or the administration of justice, is unnecessary, inasmuch as the members of the national group were designated to nominate candidates on the express ground that they were peculiarly competent to select the right persons. If the institutions mentioned in Article 6 ought to be consulted, it is to be presumed that the national groups would do so, *ex proprio motu*. It did not seem necessary to the Anglo-American members to impose this as a condition; they were not over-inclined to favor it as a recommendation. They were unwilling, however, to oppose a provision that seemed to be of great

value to some of their colleagues, especially Mr. Altamira, of Spain, and Mr. de Lapradelle, of France. In the English-speaking world these bodies may be consulted. There is no statute against it; but it is done covertly, not openly, if at all. In other countries, particularly upon the continent of Europe, it appears to be done openly and as a matter of course. Doubtless, the practice justifies itself, else it would not be continued. As the article reads, there is no obligation on the part of any national group to comply with the request. It may or it may not; its recommendations stand or fall upon their merits. The members of the national groups can not divest themselves of their responsibility, and they are likely to consult these bodies when they believe it to be useful, otherwise, not. It can do no harm; it may do good.

### Article 7

> The Secretary General of the League of Nations shall prepare a list, in alphabetical order, of all the persons thus nominated. These persons only shall be eligible for appointment, except as provided in Article 12, paragraph 2.
>
> The Secretary General shall submit this list to the Assembly and to the Council.

Nothing could be more natural than that the national groups should report to the Secretary General their recommendations, inasmuch as he had set them in motion. And nothing could be more natural than that the Secretary General should as a matter of administration prepare a list in alphabetical order of all persons nominated by the national groups and transmit it to the Assembly and Council.

It was foreseen that there might be cases in which it would prove to be desirable, advisable or necessary to go beyond the list. It was intended that this should be the exception. This fact is adverted to in the second sentence of Article 7, and the case specifically mentioned in which this is permissible. On turning to Article 12, paragraph 2, it will be found that when the Assembly and the Council have failed to agree upon the persons to be elected, the Committee of Mediation may by a unanimous vote, recommend to the Assembly and Council any person whose name does not appear in the list. It is, however, a recommendation, not an election, as the election of judges is to take place even in this instance by the concurrent action of Assembly and Council. The exception is not of the kind to eat up the rule.

### Article 8

> The Assembly and the Council shall proceed to elect by independent votings, first the judges and then the deputy judges.

As the method of appointing the judges is the heart of the project, imparting life to its body and vigor to its members, it is necessary to say something of Article 8, which made the court, although it seems so simple, so natural, so inevitable, given the League of Nations and its present organization.

The exchange of views in the Advisory Committee at its first two sessions on the 17th and 18th of June, showed that its members, while living in 1920—a fact more than once adverted to in the course of their labors—were nevertheless thinking in terms of 1907 when the Court of Arbitral Justice went to pieces on the rock of inequality. They might say that they did not represent nations, that their minds were open and their hands unfettered by instructions.[3] They were in the world, and they were of it. In this world there are large Powers, there are small powers, and we get nowhere by denying that this division should not exist. Nor do we better matters by suggesting that at bottom, large and small have a common interest in justice and the application of its rules alike to great and small. The question which will not down and which can not be brushed aside, is, how is justice to be ascertained, and how are its rules to be administered,—by the large, by the small, by both? Undoubtedly by both, for great and small exist; they must coexist, and any method with a chance of acceptance must recognize their existence and their coexistence, and it must be based upon the coöperation of both upon terms which seem just to all.

It is idle to insist that the small nations have nothing to fear from the impartial administration of justice by the great; it is idle to insist that the great nations have nothing to fear from the impartial administration of justice by the small. Neither group trusts the other, and certainly history does not lead to the conclusion that the large Powers are the depository of justice. The method must therefore seem not only just, but safe as well. It is the old story of the conflict between the supposed interests of the big and the little. In the Conference of the American States held in Philadelphia in 1787, Mr. Madison, a delegate from the large state of Virginia, said, and truly, in the session of June 19th, that "The great difficulty lies in the affair of Representation; and if this could be adjusted, all others would be surmountable. It was ad-

[3] The Advisory Committee was apparently chosen with an eye to nationality. Thus, the official organ of the League says: "The Committee will therefore be composed of ten members, five of whom are nationals of the five Great Powers and five nationals of smaller Powers" (League of Nations, *Official Journal*, June, 1920, p. 123).

mitted, he continued, by both the gentlemen from N. Jersey . . . that it would not be *just to allow Virg*ª., which was 16 times as large as Delaware an equal vote only. Their language was that it would not be *safe for Delaware* to allow Virgª. 16 times as many votes."[4]

The difficulty of representation was found to be surmountable. The method ultimately adopted by that memorable conference made it "safe" for big and little, and both entered the more perfect Union of the American States. The large states, great in extent of territory and of population as are the great Powers of to-day, were accorded representation in the House of Representatives according to population; the small states were accorded equal representation, two members of each state in the Senate. Their interests were not overlooked; they were reconciled by granting to each the protection in the legislature of the Union of States which each demanded.

The American member of the Advisory Committee called this adjustment of interests to the attention of his colleagues as a possible way out of the *impasse* of 1907 and of 1920. He pointed out that the Conference of Paris had apparently surmounted the difficulties confronting its members in much the same way: protecting the interests of the great Powers by giving them control of the Council, at the expense of equality, and protecting the interests of the small Powers by granting each Power one vote in the Assembly, in accordance with equality. Mr. Root therefore suggested that the judges should be elected by the concurrent votes of the Council and Assembly of the League of Nations.

Each judge would therefore be elected by a majority vote of each body sitting separately; each would have a veto upon the abuse of power by the other, and differences between them would be settled as they are between the Senate and House of Representatives of the United States, by "appointment of a Conference Committee of an equal number of members of each house, acting under the pressure of public opinion." This method seemed the counsel of despair to some of the members of the Advisory Committee, to use Mr. de Lapradelle's phrase, but the "counsel of despair" of 1787 produced the Union of the American States, and the "counsel of despair" of 1920 produced the agreement of 1920 upon the constitution of a Permanent Court of International Justice.

In the closing words of Mr. Madison's preface to the *Debates of the Federal Convention of 1787*, that fair-minded and far-sighted man spoke of the value of the *Debates* as "the History of a Constitution on which

[4] *Documentary History of the Constitution of the United States,* Vol. III (1900), pp. 160-161.

would be staked the happiness of a young people great even in its infancy, and," venturing a prediction, "possibly the cause of Liberty throught the world."[5] If it be not the cause of liberty—as to which it becomes an American to cultivate understatement—it appears far from improbable that it may be the cause of justice throughout the world.

The only additional item of importance in this brief article to which attention need be called is that the judges and deputy judges are to be separately elected. It had been proposed that the persons highest on the list of those receiving the necessary number of votes should be elected in the order of their votes, and that the persons lower on the list, but receiving the requisite number of votes for election, should be, in the order of their votes, the supplementary judges. This was objected to for various reasons, the first being that inferiority was created between the judges and deputy judges, inasmuch as a deputy had not received a sufficient number of votes to be elected a titular judge. In the next place, it was pointed out that deputy judges would in all probability only sit occasionally, and that persons of the very highest type might be willing to accept election as deputy judges and to render very valuable services if they would only be called upon occasionally to sit as judges in the proceedings of the court. Either reason would have been sufficient, but both prevailed, with the result that the titular judges of the court are first to be elected, and then the deputy judges.

### Article 9

> At every election, the electors shall bear in mind that not only should all the persons appointed as members of the court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

The requirement that the main forms of civilization and the principle systems of jurisprudence should be taken into account in the election of judges gave rise to more debate and discussion than any other question, except perhaps that of the method of election (Article 8) and the presence in the court of a judge of a litigating nation (Article 28). This may appear strange, because it does not seem to be an unacceptable condition that an international court should within its membership represent the main forms of civilization, for the court itself is the very bud and blossom of civilization; and that the judges should be so chosen as to represent the principal legal systems of the world,

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[5] *Documentary History of the Constitution of the United States,* Vol. III (1900), Appendix, p. 796 *n.*

for they are to be lawyers not only of one country, but of many countries; and the more familiar they are with the legal and judicial systems of other countries the more likely they are to understand a case presented springing out of one or other national system of jurisprudence. There must have been reasons which do not appear upon the surface, and there were.

First, of the legal systems. This requirement figured for the first time in the project laid before the Committee by Baron Descamps, who stated frankly and unreservedly that it was in his opinion the best way of securing to the larger states a permanent representation in the court without violating the principle of equality of nations, inasmuch as, in his opinion, each of the leading nations could be said, or for the purposes of the election be held, to have a distinct system of jurisprudence. This proposition was exceedingly agreeable to Mr. Adatci of Japan, whose country does indeed possess a legal system and a civilization differing from those of European origin. The acceptance of this principle would, therefore, secure Japan a permanent representative in the court. Lord Phillimore was willing to consider the common law as a distinct system and accept it as a criterion if it gave his country a judge. Mr. Root was interested, not merely because it might give the United States a judge, but because, as the result of mature reflection, he had advocated the consideration of this element in his instructions to the American delegation to the Hague Conference of 1907, and, as will be seen presently, he was still of the same opinion. Mr. de Lapradelle of France, was, however, bitterly opposed to this provision, notwithstanding that its acceptance would have given his country a judge. But although adverse to the consideration of legal systems as such, he was in favor of securing representation of the main forms of civilization. The truth is, there is only a superficial distinction between the two criteria, for law is a growth, as is civilization, and there is a very distinct relation between the civilization of a country and its system of jurisprudence. The legal systems of the world would have fared better in this connection if the purpose for which they were invoked by Baron Descamps had not been so obvious; for the smaller Powers were opposed to any method which would of right secure to the large Powers a preferred position in the court. While the small Powers are apparently willing to elect representatives of large Powers, they are unwilling to be forced to do so, and they balk at any proposal which would outwardly have that effect. Again, Baron Descamps apparently stated the principle in such a way as to suggest that he had in mind not merely systems of municipal law, but of international law of the different countries. This was clearly a

misconception, because no one knows better than he, a time-honored professor of the law of nations, that there is but one system of international law, and that it is and must be universal. When, however, the method of electing the judges by the concurrent action of Assembly and Council had been adopted, there was less reason to oppose the principle; especially after Mr. Root had laid before his colleagues the reasons of a practical nature which had caused him to propose that requirement in the first instance. In his instructions to the American delegation to the Second Hague Peace Conference, Mr. Root stated that the judges should be so selected from the different countries that "the different systems of law and procedure" should "be fairly represented." In reply to a request made by Mr. Altamira of Spain, as to the purpose of this requirement, Mr. Root stated that it was "the practical discovery of the extreme difficulty which I had, and which others around me had, in understanding the procedure and the forms of expression, the manner of thought of persons who have lived in a different system of jurisprudence, a different phase or form of expression of civilization." After saying that it was his duty to review and pass judgment upon proceedings had under Spanish law,[6] Mr. Root continued:

I found that it was extremely difficult for me to understand what they were doing, and I had to apply myself assiduously to the study of their proceedings, the names of words they used, the things they were doing in the Spanish courts.

I found that the countries following the lead of Spain had the most admirable system, most admirably adapted to the habits and the customs of life that followed that course—wholly unadapted to my own country, and that the method of procedure, the forms of action in my own country, would be wholly unadapted to the customs and habits of the Spanish American people. All over the world the same thing exists. The jurisprudence of each country is the growth of their customs and habits, the ways of doing business of the people of the country; in every country the procedure is the growth of the life of the country. Now what we want here is a court which will understand the sympathies of thought, the opinions, the prejudices, the forms of expression, the ways of acting, of all the people of the world—of the civilized world.

It was not a means of securing a judge for one country or another, but it was a means of securing an understanding court, a court that would understand the case brought before it, that underlay the instructions which I gave to the delegates of the Conference of 1907.

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[6] From a sentiment of delicacy Mr. Root refrained from saying that his experience was in connection with the administration of Cuba, Porto Rico and the Philippines, all of which had previously been Spanish colonies.

Before such argument opposition could not well raise its head. The sensibilities of the previous opponents were satisfied by limiting the requirement to the principal systems of law.

Next as to civilization. It would seem that Mr. Root's statement applied with only less force to this requirement, as in his opinion, confirmed by the judgment of mankind, law and civilization go hand in hand, and it is impossible to explain one without an understanding of the other. It would seem that the objections to a consideration of the forms of civilization would be greater than to the systems of jurisprudence, inasmuch as every nation is proud of what it is pleased to call its civilization, and there are not cases wanting in history in which a powerful and aggressive country has sought to impose its civilization upon the world. On all such occasions each nation has preferred to stand by its own civilization, and would be unwilling to confess, although it might inwardly admit, that its civilization did not belong to what outside and disinterested persons would call "a main form." Mr. Hagerup, who was opposed to representing different systems of law, was also opposed to representing "civilization" as such. But there was a considerable sentiment in favor of it, even among those who had opposed the representation of legal systems. Possibly Mr. Root's reasoning was convincing; possibly the question was not so important when it was not to be used as a means for securing permanent representation of the larger states; possibly the existence of this requirement was due in large measure to the earnestness with which Mr. Altamira advocated it. And, assuredly, no one could blame a loyal and devoted son of Spain for breaking a lance in behalf of the civilization of the country which has given the language and literature, the institutions and traditions to eighteen republics of the New World, itself discovered through Spanish enterprise. However that may be, a court which represents the main forms of civilization and the principal legal systems of the world will be an international court, it will be an understanding court, it will be an efficient court.

### Article 10

> Those candidates who obtain an absolute majority of votes in the Assembly and the Council shall be considered as elected.
>
> In the event of more than one candidate of the same nationality being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

It is necessary that the persons elected judges should have the confidence of the Assembly and Council. This may be expressed in various

ways; by an ordinary majority, by an absolute majority, or by a still larger majority vote. A simple majority was not acceptable for election to the court and indeed it was not seriously considered, as it might, in the case of several candidates, be less than half. An absolute majority, that is to say, more than half of the votes cast in the Assembly and Council, met with the approval of the Advisory Committee. More stringent requirements had been proposed, such as two-thirds and three-fourths, but it seemed advisable to follow what is regarded as a reasonable requirement in such cases. The absolute majority was therefore adopted unanimously and not as a compromise.

Some members of the Committee were apparently of the opinion that some countries with an excess of jurists might find themselves with more than one representative on the international bench. Therefore in the improbable and, in any event, rare case that two persons of one and the same country should receive an absolute majority of votes in both Assembly and Council, Article 10 provides that the elder is alone to be considered elected. This is in accordance with the preference of "young men for action and old men for counsel."

### Article 11

> If, after the first sitting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third sitting shall take place.

It was foreseen that all judges might not be elected at the first sitting of the electoral bodies, even though each judge should be balloted for separately. Even if the Assembly should by an absolute majority elect all the judges to be chosen at a single sitting, the Council might not be so fortunate; and if each should elect the requisite number of judges by an absolute majority, it might happen that some person or persons might be elected by one of these bodies and fail of election in the other. Article 11 therefore wisely provides for a first, for a second, and for a third sitting of each body if necessary in order to compose the court in first instance, or to fill such vacancies as should exist from time to time.

### Article 12

> If after the third sitting one or more seats still remain unfilled, a joint Conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Committee is unanimously agreed upon any person who fulfils the required conditions he may be included in its list, even though he was not included in the list of nominations made by the Court of Arbitration.

If the Joint Conference is not successful in procuring an election those members of the court who have already been appointed shall, within a time limit to be arranged by the Council, proceed to fill the vacant seats by selection from amongst these candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

To an American, used to appointment of conference committees by the two branches of the federal legislature in order to agree upon different bills or different provisions of one and the same bill, the main feature of Article 12 does not require explanation or comment. But the members of the Advisory Committee were apparently not familiar with this system, and it was on various occasions both in and out of the Committee, explained by Mr. Root, its proposer. His explanation, however, did not completely satisfy his colleagues, although he stated that it was the constant practice of conference committees of the House of Representatives and of the Senate of the United States, on which he had repeatedly served, to agree, and that they were forced to agreement by the pressure of public opinion which insisted that important measures should be passed, not defeated in one house or the other because of unimportant provisions.

At first it was thought that the conference committee would itself elect, but it was explained that its duty was to report, not to elect, a fact very happily expressed in the phrase "Committee of Mediation," which was suggested by Baron Descamps, and adopted by the Committee with much satisfaction.

Mr. Root had proposed that the Committee of Mediation might report persons to the Assembly and Council whose names did not figure in the list, as it might be that one or the other body was opposed to some of the prospective judges. There was very considerable objection to this, as it might enable the Assembly or Council to contravene the list by failing to elect, and then allow the Committee of Mediation to submit names which had not already had the approval of the national group of members of the Court of Arbitration. Using the language of American political life, it was suggested that this provision might enable the nomination of a "dark horse." It was said that there might be no objection to "one such animal," but, as Baron Descamps wittily put it,

"they did not care to have a whole stable of dark horses." Therefore, in a spirit of compromise, it was agreed, without a dissenting voice, that the Committee of Mediation might recommend any person or persons otherwise meeting the qualifications for the office of judge, although outside the list, provided the Committee was unanimous in the recommendation of such persons.

But it was not certain that even in this way all the judges would be elected in first instance, or the vacancies filled that might occur. To secure this result, Mr. de Lapradelle made the happy suggestion, which met with the approval of the Committee, that in such a contingency the Council might set a time within which the judges already elected should fill the vacancies. But here again the Committee was unwilling, and wisely, that, the judges should exercise an unlimited discretion. They were indeed permitted to fill the vacancies, but only from those persons who had received votes either in the Assembly or in the Council.

It is to be observed that the judges are not restricted to the list proposed by the national groups of the Permanent Court of Arbitration. A person recommended by the Committee of Mediation and for whom votes had been cast in either the Council or the Assembly would seem to be eligible.

Finally, Mr. Hagerup suggested that the judges already elected might be an even, not an odd number, and that there might be a tie. This was obviated by the provision that if such a case should occur, the eldest judge should have a casting vote, thus breaking the tie.

If human ingenuity is to be trusted, it would seem that these provisions are bound to secure an election.

### Article 13

> The members of the court shall be elected for nine years.
>
> They may be reëlected.
>
> They shall continue to discharge their duties until their places have been filled.
>
> Though replaced, they shall complete any cases which they may have begun.

A characteristic of arbitration is the appointment of arbitrators or judges by the parties in controversy after the difference has arisen. A characteristic of a court is the appointment of judges in advance of the case and without reference to any particular instance. A characteristic of arbitration is that the tribunal appointed for the hearing and adjustment of a dispute passes out of existence with its decision. A characteristic of a court is that, appointed in advance of and without refer-

ence to a particular case, it continues after its decision. In consequence, the experience gained by the members of an arbitral tribunal in the trial of a case is lost upon future cases, whereas the experience gained by judges in one case before a court inures to the benfit of an innumerable and endless series of cases. Arbitral sentences are separate and distinct pronouncements, more or less based upon respect for law; decisions of a court are related to what has gone before and to what follows, as links in an endless chain, each decision based not merely upon respect for law but upon law.

That the Society of Nations may have the full benefit of the establishment and successful operation of an international court of justice, it is necessary that judges, good when appointed, may become better by experience; that constant association in the administration of justice shall develop an *esprit de corps;* that each decision, based upon the firm foundation of the past, may be a guide to future decisions, and that the court may become a beacon to the nations as everywhere a lamp in the path of progress.

For this, time is needed, and preferably a long period for each of the judges upon the international bench. Many advocates of judicial settlement have proposed that the judges be elected for life. The Court of Arbitral Justice proposed a term of twelve years; the International Prize Court adopted six years; the Advisory Committee struck a balance of nine years.

The rejection of a life tenure inevitably led to the acceptance of the principle of reëlection, in order that faithful and efficient service should be rewarded and the court continue to profit by the experience of the individual judge in the trial and disposition of causes. The adoption of a somewhat long tenure of office is advisable in the interest of the judge, that he may give the full measure of his capacity, and it is in the interest of the continuity of the court. A term less than life tenure—and nine years is to be considered as a moderate term—is advisable, that judges who have failed to justify their election should automatically step from the bench. In other words, a fixed term of years, long enough for the judge to show his mettle, short enough to relieve the bench of an inefficient member, settles, without raising many questions. One and not the least embarrassing of these is the removal from office, which would have to be met in case of a life tenure or a long term of years, inasmuch as the members of the court and the Society of Nations can put up for awhile with inefficiency in one or even more of its members if the date of retirement for one cause or another is always in view.

That a judge shall continue in office until his successor has been

elected and qualified, is common practice, based upon experience, and that the judge, though replaced, shall complete a case which is already begun, is in the interest of the litigating parties. The meaning of this provision of Article 13 is to be understood that the case in question shall not merely be before the court but that its hearing shall have been begun, and that the judge shall already have taken part in the trial and disposition of the case. His withdrawal before judgment might in such a case cause delay and prejudice the interest of the parties.

Taken in conjunction with Article 14, it is evident that the membership of the court will need to be renewed at the end of nine years, inasmuch as the commissions of all members, titular or deputy, will expire nine years from election. Were it not for the provision for reëlection, the renewal of the bench every nine years might be detrimental to the court, as even men of ability require time to familiarize themselves with new and unexpected duties. Notwithstanding the uncertainties of election, it is, however, reasonable to presume that at least a remnant of the old will be found among the new members, and that, in the language of everyday life, this little leaven will leaven the lump.

### Article 14

> Vacancies which may occur shall be filled by the same method as that laid down for the first election.
>
> A member of the court elected to replace a member the period of whose appointment has not expired will hold the appointment for the remainder of his predecessor's term.

If the method adopted for the election of judges is a good one and secures good judges, there is no reason opposed to, and every reason in favor of filling vacancies by a method which has justified itself. Therefore, if the recommendations of national groups of the Permanent Court of Arbitration proves satisfactory, they should be asked to submit their lists of available persons to fill vacancies in the court. This is the sense of Article 14.

It cannot be disguised, however, that this method of selection involves time, and that when the recommendations of the national groups have been made, the election depends upon the action of two electoral bodies, which may not meet at regular or at short intervals. Therefore the vacancy is likely to continue for some time, and the court might be short-handed, were power not vested in the court by Article 15 to call deputy judges to the bench.

For what period of time shall a member be elected to replace another? This was a question which perplexed the committee and was

only decided after much discussion and with some misgiving on the part of some members. It was eventually agreed that the new member should fill out the term of his successor. The objection to this was that precedent is against it. Thus, Article 44 of the Pacific Settlement Convention as revised in 1907 provides that in case of the death or retirement of a member of the court, his place is to be filled in accordance with the method of his appointment, that is to say, for a period of six years. Article 11 of the Prize Court Convention provides, "should one of the judges or deputy judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years." Article 3 of the Draft Convention for the Court of Arbitral Justice provides that in such cases the vacancy is filled in the same manner as the original appointment and that "in this case, the appointment is made for a fresh period of twelve years." The reason for the rule adopted for the Prize Court and the Court of Arbitral Justice was the desire to preserve the continuity of the court by the presence of judges appointed for the full term. This method was calculated to prevent a renewal of the court every six or twelve years, respectively. The advocates of continuity, therefore, preferred to follow precedent.

On the other hand, it was felt that a great and counterbalancing advantage would accrue to the court if every nine years all of the judges should be appointed anew. Such a spectacle would impress public opinion, and the existence and successful operation of the court depend largely upon public opinion. Preparations could and would be made in advance for this event, and if there should be an interval between the expiration of the term of nine years and the new appointments, the members of the court would hold until their successors qualified, thus continuing the court "in being." Finally, the continuity of the court would be preserved by the continuance in office of those judges who have won the confidence of the Society of Nations.

### Article 15

> Deputy judges shall be called upon to sit in the order laid down in a list.
>
> This list shall be prepared by the court, having regard first to the order in time of each election and secondly to age.

The deputy judge must, as previously stated, possess the qualifications of a titular member, the chief difference being that the titular judge is to sit regularly, whereas the deputy may only act occasionally as a judge. It is expected that the deputy will in every way be equal

to the permanent judge. Indeed, he may be superior, as it may well be that a man of the highest attainments might be willing to sacrifice a portion of his time to a great cause, whereas he might be unable to accept a post which would inevitably require his presence at The Hague for a longer or shorter time of every one of the nine years of his appointment. The deputy judge is, however, a member of the court, even though he may be called upon only irregularly or intermittently to participate in its labors. If a military expression be permitted, the titular judge is in active service, the deputy judge is in the reserve. The deputy judge began as an outsider; he ended by being a member of the court, with equal qualifications, with equal rights, although perhaps less onerous duties.

In the early sessions of the Committee, the titular were considered the only judges of the court. In the closing sessions the court was considered as composed of fifteen members, of whom eleven were titular and four deputy judges. Little by little, it dawned upon the Committee that it was impossible to draw a distinction between the two classes without discrediting members of one class and therefore the court, inasmuch as they would be called upon from time to time to take their seats upon the bench with the titular judges in the trial and disposition of causes. If the number of titular judges be raised to fifteen and the deputies to six, in accordance with the provisions of Article 2, the court will consist of twenty-one members.

When shall the deputy judges be called into active service? The answer is, in case of a vacancy caused either by the death or inability of a titular judge to attend to his official duties. What deputy judge shall be called? Who shall call him? Shall the call depend upon conditions? These are matters of very great importance. It is of interest to the deputy judges to know, if possible, in what order they may be drawn upon. It is in the interest of the court. It may also be in the interest of the litigating parties. Therefore, the Committee wisely provided that the deputy judges should be called in the order laid down in a list to be prepared by the court. But the court, however, is not to be a free agent in this important matter. Account is to be taken of priority of election, and also of age, inasmuch as age and experience usually go hand in hand. This does not mean, however, that deputy judges will sit according to priority of election or according to age, as they may be unable at the time of the call to respond. It means, however, that these two elements are to be taken into account, not overlooked.

ARTICLE 16

The exercise of any function which belongs to the political direction, national or international, of states, by the members of the court during their terms of office is declared incompatible with their judicial duties.

Any doubt upon this point is settled by the decision of the court.

The framers of the project realized that the success of the court would depend upon the independence as well as upon the character and qualifications of its judges. Therefore, in addition to character and professional attainments, they provided that the judges should be independent, and that they should be elected regardless of their nationality. It is one thing to say that the judges shall be independent; it is quite another to have them really so. It must depend upon the judge whether he will or will not be independent, and yet every precaution taken in election to remove him from the influence of his government is in the interest of independence. The withdrawal of temptation is a step toward salvation.

But it may happen that a person possessing in a high degree the qualifications for appointment, holds a position at the time of his election which, given human nature as it is, is calculated to hamper or restrict the judge in the performance of his judicial duties or to raise doubt in the mind of the public as to his liberty of action. Within national lines judicial have been separated from political functions, as a result of long and well-nigh universal experience. The judge appointed by political power has in many instances been withdrawn from its influence by life tenure and by provisions of the law to the effect that his salary may not be decreased during his tenure of office; and removal from office, which may be necessary betimes, is so hedged about with limitations that any and every judge is sure of his position if he attends to his judicial duties.

In more than one session the Committee discussed this question in its various bearings without reaching an agreement. Upon the suggestion of the president, an informal meeting of the members of the Committee was held on July 10th, of which no minutes were kept, with the result that the desired agreement was reached, in confirmation of Lord Macaulay's dictum that "men are never so likely to settle a question rightly as when they discuss it freely." This agreement, drafted by Mr. Root, gave effect not only to his own views, but to the views of the Committee, as it was adopted then and at the ensuing formal session of the same day without a voice of dissent.

It will be observed that no attempt is made to enumerate the cases of incompatibility, as it was supposed, and rightly, that experience might prove the list to be inadequate. The incompatibility, therefore, is stated by description, and applies to the exercise of any function by members of the court which belongs to, is under or subject to the political direction, whether it be national or international, of states.

In the consideration of this matter a difficulty invariably presents itself which must be met and overcome. The judgment of the court is to be final. It should not be open to either of the contending parties to question its validity on the ground that one or more of the members of the court held an extrajudicial position incompatible with the performance of judicial duties. Somebody must decide this question. It is judicial in its nature; therefore it should be decided by the court, and the Committee very wisely vested the court with this power and duty. In first instance, however, the member will pass upon the question himself. He can not hold both positions. Which will he prefer? If he chooses the court, he should resign the position in conflict with his judicial duties. If he prefers to retain his position, he should refuse the judicial post. In doubtful cases, the court is to decide.

Inasmuch as the Committee refrained from enumerating positions, it is unwise to attempt to do so in this connection. It is, however, proper to remark that the Committee seemed to be of the opinion—if one can judge from the course of discussion—that membership in a national court of justice would not be incompatible; and that membership in a legislative body would not be incompatible. The Committee was on the other hand clearly of the opinion that membership in the diplomatic service would be incompatible, and that a Minister of Foreign Affairs and his assistants could not accept the post of judge and retain their positions. Persons standing to the foreign office in an advisory capacity would likewise be unable to accept membership in the court and retain such positions.

The question is, however, to be decided by the court whenever it arises.

### Article 17

> No member of the court can act as agent, counsel or advocate in any case of an international nature.
>
> No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel, or advocate for one of the contesting parties, or as a member of a national or international court, or of a commission of inquiry, or in any other capacity.
>
> Any doubt upon this point is settled by the decision of the court.

The sense in which incompatibility is used in the project refers to incompatibility of position. There is, however, an impropriety of a personal or official kind, separate and distinct, and yet so closely related as to be properly considered in one and the same connection.

The project contemplates that the court shall be, in the language of Mr. Root's instructions to the American delegates to the Second Hague Conference, "composed of judges who are judicial officers and nothing else . . . and who will devote their entire time to the trial and disposition of international causes by judicial methods and under a sense of judicial responsibility." A judge who is to be a judge and nothing else should not engage in the practice of law, even though he appear in a different court. The fact that he is a judge might influence, favorably or unfavorably, the judges before whom he pleaded, and in any event his presence would be embarrassing. A judge of an international court should not hold a brief for any country in a case of an international nature. He should be free to decide any case which comes before him as befits a judge, as my Lord Coke would say. As a judge he should neither be asked nor permitted to pass upon his own conduct in a previous case, as he would if he were allowed to sit in the trial and disposition of a case decided by a body, national or international, of which he had been a member or in which he had appeared as agent, counsel or advocate. These restrictions upon the activity of a judge are the veriest of commonplaces; yet they are essential to the administration of justice and should be stated. This was the opinion of the Second Peace Conference, which embodied them in Article 7 of the Draft Convention for the Court of Arbitral Justice. This was the opinion of the Advisory Committee of Jurists, which took them, with slight changes of form, from that convention and incorporated them in Article 17 of the project for a Permanent Court of International Justice.

As in the case of incompatibility of function, so in the case of impropriety of action, doubts are likely to arise, and the finality of judicial decision requires that this shall be resolved in such a way as not to affect the judgment. Hence, in one case as in the other, the court is to decide.

### Article 18

> A member of the court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.
>
> When this happens a formal notification shall be given to the Secretary General.
>
> This notification makes the place vacant.

Nothwithstanding the qualifications prescribed for the judges, notwithstanding the selection of the candidates by the national groups of the Permanent Court of Arbitration, notwithstanding the scrutiny of these names and persons by the Assembly and Council before their choice by these bodies, it is possible that an unworthy person may be elected, or that the person meeting the requirements at the moment he is elected may cease to meet them. Such instances are not unknown in national life, and they have been met in various ways. In Great Britain a judge may be removed by petition of both houses of Parliament. In the United States a federal judge may be impeached in the Senate of the United States with a consequent loss of office if the charges be sustained. A case arose in the Supreme Court of the United States in which the presence of a justice was embarrassing and his continuance as justice interfered with the efficiency of the court, without any misconduct on the part of the member in question. His mind became so deranged that he could not perform his judicial duties. His continuance as a member of the court prevented a competent successor from performing those duties. The remedy was found in a special act of Congress enabling him to retire from the bench with full salary.

The fact that a judge of the proposed court is only elected for a term of nine years will necessarily suggest that, except in flagrant cases, no action be taken. Nevertheless, if an extreme case present itself, there should be a remedy. Article 18 meets the emergency by providing that the unanimous opinion of the other members of the court that a member has ceased to fulfil the required conditions, transmitted to the Secretary General, shall of itself vacate the seat of the judge in question.

### Article 19

> The members of the court, when outside their own country, shall enjoy the privileges and immunities of diplomatic representatives.

It is unnecessary to descant upon the simple provision which secures to members of the court the privileges and immunities which duly accredited diplomatic agents receive, not merely at the hands of the government to which they are accredited, but at the hands of other foreign governments during the tenure of their office. The provision is a familiar one in the Hague Conventions. It is found in the Pacific Settlement Convention of 1899 (Article 24) and in the revision of 1907 (Article 46). It is found also in Article 13 of the Prize Court Convention. It was taken from Article 5 of the Draft Convention for the Court of Arbitral Justice. There is a slight difference in form, but apparently none in substance.

The provision is no doubt necessary, inasmuch as it figures in these various documents adopted on three separate occasions. It is, however, in advance of international law, which restricts diplomatic privileges and immunities to the countries to which the representative is accredited. It is in strict accord with the American practice. The United States has always accorded diplomatic privileges and immunities to all diplomats touching its shores. This extension of the strict letter has worked well, and it will no doubt do so not only in the United States but also in other countries.

### Article 20

> Every member of the court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

The oath to be taken by a judge before entering upon the performance of his duties has been the subject of elaborate discussion within national lines and at internationl conferences where the question has arisen. That admirable sect known as Quakers, who call themselves the "Society of Friends," objected to swearing, although willing to affirm. Their view has prevailed generally, so that to-day, oath and affirmation are looked upon as synonymous and accepted as equally effective.

At the Second Hague Conference the subject was discussed, and both in the Prize Court Convention (Article 13) and in the Draft Convention for the Court of Arbitral Justice (Article 5), it was provided that before taking their seats, the judges and deputy judges should swear or make a solemn affirmation before the Administrative Council to exercise their functions impartially and conscientiously. This is the source of the present article, but "a solemn undertaking" has been substituted for the oath or affirmation.

A considerable difference of opinion manifested itself in the Committee as to the form of the engagment. Among the forms suggested was that the judges should undertake to perform their duties in accordance with international law, "even should such law not coincide with national interests or desires,"[7] and others of like import. It was decided, however, that the simpler form by which the judge undertook in open session to exercise his powers impartially and conscientiously constituted an engagement to the nations which fully satisfy the requirements of the case.

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[7] Five Power Plan, Article 3.

ARTICLE 21

The court shall elect its president and vice president for three years: they may be reëlected.

It shall appoint its registrar.

The duties of registrar of the court shall not be considered incompatible with those of Secretary General of the Permanent Court of Arbitration.

The judges are elected; they are so many individuals; they are not a court and they can not enter upon the performance of judicial duties until they have qualified by a solemn undertaking to perform the duties of their office. After this formality they are members of a court, and they are in a position to proceed to its organization as far as this depends upon them.

The first act of the judges is declared to be the election of their president and vice president. This is a very important step, because the president of a court is not merely a judge, he is an administrative officer as well. If a man of dominating personality, he runs the court and goes far to determine its judgment. Therefore, the greatest care should be taken in his selection. In his absence, the vice president performs his duties. They should be men of equal character, ability and attainments, so that in the absence of the president the court, under the vice president, will continue its labors without interruption and without detriment.

It was felt that, given the immense prestige of the position of president of the court, the power which he might exercise and the influence which he might bring to bear upon his colleagues, it was inadvisable to elect him for the full term of his office, that is, nine years. One year, on the contrary, seemed too short, inasmuch as the president is to reside at the seat of the court. A period of three years was adopted as a compromise, as an inducement to merit continuance in office at the expiration of his term, and of a further term, inasmuch as it is expressly provided that the president and vice president may be reëlected.

It has been stated in the course of this report that great care was taken by the Committee that the deputy judges should possess the same qualifications as titular judges. Mr. de Lapradelle, of France, frequently dwelt upon the importance of according to the deputy judges equal rank and dignity, and Mr. Fernandes, of Brazil, likewise advocated their cause. They were finally successful in their advocacy. The Anglo-American members of the Committee were not much impressed in their favor, inasmuch as the system of deputy judges does not exist in the English-speaking world. Little by little, however, as other mem-

bers of the Committee laid stress upon the nature and importance of their functions Lord Phillimore and Mr. Root yielded to the arguments of their colleagues. In the session of July 12, Mr. Root said, in reply to Mr. de Lapradelle's remarks on the subject:

I am converted to his view now, and feel bound to say that it is desirable to magnify the importance of supplementary judges, and for that purpose I am quite ready to abandon the position I took the other day in regard to their participation in the election of the president. I think that this consideration should overcome the consideration we had in mind at that time to exclude them,— I, personally, am ready to agree to the reconsideration of that subject, and to give them a share in the election of the president, in order that the position may be deemed of high dignity and conscience, and that the states may feel that they are receiving consideration if their citizens become supplementary judges, and that these judges have an important mission.

Although there appears to have been no vote on the subject, it would seem to be the understanding of the Committee that the deputy judges as members of the court should take part in the election of the president and the vice president. This means, of course, that they would be obliged to proceed to the seat of the court at least once in three years, even supposing that they did not in the meantime participate in its labors. Considerable expense would be involved in this, but the reasons advanced were convincing on that occasion and doubtless will be in the future, if the question should again arise.

It will be observed that throughout the entire project existing agencies are used in preference to creating new ones; the judges of the court are would avail itself of the clerk's office of the Permanent Court of Arbitration; the judges are to be elected by the concurrent action of the Assembly and the Council. We would naturally expect that the project would avail itself of the clerk's office of the Permanent Court of Arbitration rather than create a new office, if the one body could serve the needs of both.

When it was decided that the Court of International Justice should be located at The Hague, as is the Permanent Court of Arbitration, it was suggested that the Secretary General of the Permanent Court of Arbitration could properly act as registrar of the new court. Unwilling, however, to decide a question in advance which could perhaps better be determined by experience, the Committee contented itself with the statement that the duties of the registrar of the court should not be considered as incompatible with those of the Secretary General of the Permanent Court of Arbitration. This was a happy suggestion and it is admirably stated. It shows the connection between the two institu-

tions and it tends to prevent the appointment of unnecessary officials whose time might lie heavy on their hands. It also saves expense, if the nations are minded to become economical again.

### Article 22

> The seat of the court shall be established at The Hague.
>
> The president and registrar shall reside at the seat of the court.

The seat of the court is to be at The Hague. The Advisory Committee was not only unanimous on this point, but would not allow the court to be removed elsewhere temporarily, for the sake of convenience, or even in the case of *force majeure*. This would be a very important provision if it stood alone. It does not. The Permanent Court of Arbitration is located at The Hague. An Academy of International Law and of Political Science will, it is expected, shortly be opened at The Hague. The international conferences, unfortunately called Peace Conferences, but in the future to be called Conferences for the Advancement of International Law, will, it is hoped, meet regularly and at stated periods at The Hague. This means that The Hague is to become the judicial center of the Society of Nations.

The choice of The Hague does not need to be justified. Without attempting to do so, it may be permissible to add in passing that it will doubtless be a consolation to votaries of international law to know and to feel that the country of Grotius, commonly considered the father of the law of nations, is to become the center of the development and administration of that system of law. Fortunately, the good deeds of some men are not interred with their bones.

Where are the judges to reside? The seat of the court is The Hague. The clerk's office must be with the court. The registrar must therefore reside at The Hague even if the court does not designate as registrar the Secretary General of the Permanent Court of Arbitration. What of the judges? The president should be with the court, as well as the registrar. Article 22 so provides. But what of the other judges? The time may come when the business of the court will require the presence of all the judges at The Hague, but until the court justifies itself, the requirement of residence at The Hague might impose too great a hardship upon its members, for it is little less than a hardship to sever the ties of home and to settle for a period of years in a foreign city. The sacrifice should not be asked unless there are compensating advantages. The Supreme Court of the United States, the prototype of an international court of justice, had little to do in the first years of its existence, and its judges

met and adjourned until cases found the way to their bar. History has a way of repeating itself. If it does, the Permanent Court of International Justice will one day need all of its judges in permanent residence at The Hague.

ARTICLE 23

A session shall be held every year.

Unless otherwise provided by rules of court this session shall begin on the 15th June, and shall continue for so long as may be necessary to complete the cases on the list.

The president may summon an extraordinary meeting of the court whenever necessary.

It is, however, essential that there shall be one session of the court every year. With or without business the judges should come together. They should exchange views. They should prepare for the day when business is sure to press upon the hours of leisure. The date of the annual session should be fixed in advance, so that the members of the court should be able to arrange their affairs to enable them to attend. The date chosen is the fifteenth of June—the opening date of the Second Hague Peace Conference,—and the project very properly provides that the session shall continue as long as may be necessary to complete the cases before the court. This provision reproduces the substance, with slight changes of form, of Article 14 of the Draft Convention of 1907 for the Court of Arbitral Justice.

It is impossible to determine when an extra session of the court may be required by urgent business. The contingency was foreseen and met by the last clause of Article 23, which authorizes the president to call an extra session of the court whenever circumstances may require it.

ARTICLE 24

If, for some special reason, a member of the court considers that he cannot take part in the decision of a particular case, he shall so inform the president.

If, for some special reason, the president considers that one of the members of the court should not sit on a particular case, he shall give notice to the member concerned.

In the event of the president and the member not agreeing as to the course to be adopted in any such case, the matter shall be settled by the decision of the court.

The court is in session at The Hague and cases are before it. One of the judges believes, rightly or wrongly, that he should not take part in the trial and disposition of a particular case. What should he do?

Article 24 provides that he shall in such a case inform the president. If, on the other hand, the president is of the opinion that a judge should not sit in a particular case, Article 24 provides that he shall give notice to the member concerned. There may well be a difference of opinion on these matters. The president may not agree with the member; the member may not agree with the president. Who shall decide? The court, says Article 24, and rightly, for this is a matter that concerns not merely the member and the president but the judgment of the court. Hence the court should decide. It will be observed that the project refers in each case to a "special reason," without, however, attempting to define or state it. The members of the Committee had mentioned in general terms the incompatibility between the position of judge and national and international positions (Article 16). They had stated certain contingencies of a general nature which should prevent a judge from taking part in cases before the court (Article 17). Special cases, which they could not well enumerate and which they did not attempt to define, might arise in which the conscience of the member or the anxiety of the president might suggest abstention.

The project foresees and provides against any occurrence of this kind.

ARTICLE 25

> The full court shall sit except when it is expressly provided otherwise.
>
> If eleven judges cannot be present, deputy judges shall be called upon to sit in order to make up this number.
>
> If, however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the court.

The court is to consist for the present of eleven titular and four deputy judges for a variety of reasons which have been already mentioned under Article 3. The project very properly provides in Article 25 that the court shall exercise its powers in full session; that it shall sit *in pleno*. Recognizing, however, that circumstances might require the general rule to be modified, the right to do so was wisely reserved. It may happen that eleven judges are not present, or, if present, that one or other of them is disqualified for reasons set forth in Articles 16 and 17, or for some special reason contemplated in Article 24. What is to be done in such cases in order that the court shall have its eleven members? Article 25 foresees these cases, providing that in any one of them "deputy judges shall be called upon to sit, in order to make up this number." It seems very easy and simple, and yet it was the result of debate and compromise. The members unfamiliar with the system of

deputy judges were inclined to the view that, if eleven judges were not present, less than this number could act, and fixed the quorum at nine. The advocates of deputy judges, particularly Mr. Fernandes, insisted, and properly, that they should be called upon to complete the number. It is difficult to see why deputy judges should be appointed if they were not to take the place of absent members, and to allow the court to sit with a much reduced membership when titular judges could not be present would discredit in advance the institution of deputy judges.

Indeed, the absence of a single judge weakens the court, by depriving it of a representative of a main form of civilization or of a principal system of jurisprudence. The addition of deputy judges, possessing the qualifications and attainments of titular judges, would remedy this defect. For this reason, if for no other, the advocates of deputy judges spoke in the interest of the court. There was, however, another reason of the greatest importance, political, perhaps, but none the less to be considered in the establishment of an international court of justice. Many nations, as Mr. Fernandes pointed out, would never be represented on the court by a titular judge. Some of these nations would have deputy judges, and not only the nations having deputy judges but nations not represented upon the bench would feel a greater interest in a court if the deputy judges were called upon to take part in its proceedings. Mr. Fernandes' view prevailed for the reason stated by Mr. Root at the session of July 14:

> I am now ready to agree with Mr. Fernandes in his wish that if there be under eleven judges, supplementary judges be called in, but I do not think that we should make eleven judges necessary to the exercise of jurisdiction. Some will be ill, some will be detained, and then the court must sit idle. Let nine be competent to exercise jurisdiction, but provide that if there be less than eleven, supplementary judges be called in.

This is only another instance of the truth that a conference or committee is often wiser than its wisest men.

### Article 26

> With a view to the speedy dispatch of business the court shall form, annually, a chamber composed of three judges, who, at the request of the contesting parties may hear and determine cases by summary procedure.

It was provided in Article 25 that the court should sit *in pleno* unless otherwise provided. Article 26 does otherwise provide, by permit-

ting, at the request of the parties in controversy, a court composed of three members to decide the disputes which they may wish to have settled by the smaller tribunal.

The chamber may also be called upon to give advisory opinions under the terms of Article 36 of the project.

This provision is taken in substance, though not in form, from Article 16 of the Draft Convention of 1907 for the Court of Arbitral Justice, which authorized the court annually to nominate three judges to form a special delegation. The reason in each case was the same. The court might not be in session, and it would take much time and would cause the expenditure of much money to bring all of the judges to The Hague to pass upon questions which might not after all, in the opinion of the parties, require the presence of the full court. If the case should turn out to be one of great importance and of universal concern, the president would doubtless be asked by one or other of the parties in litigation to exercise the authority vested in him by Article 23, to summon an extraordinary meeting of the full court; or, if the court were in session, the case would, under like circumstances, either at the request of the parties or upon an intimation by the president, be transferred to the full bench.

In any event, summary procedure will need to be defined, as the expression standing alone is vague and indefinite. It is a newcomer in international relations. It was proposed in 1907 by the French delegation to the Second Hague Conference to facilitate recourse to arbitration, by cutting down the number of arbiters from five to three, by substituting written procedure for oral argument, by dispensing with advocates and counsel, although, by the Pacific Settlement Convention creating it, the tribunal was expressly authorized "to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in court it may consider useful."[8] This system has been invoked in the settlement of the dispute decided at The Hague in 1920 between France, Great Britain and Spain, on the one hand, and Portugal, on the other, growing out of the confiscation by Portugal of church property belonging to citizens or subjects of the complaining states.

It may perhaps be stated before leaving this phase of the subject, that there was much discussion as to the formation of such a chamber. Baron Descamps had proposed a chamber of five, and indeed, advocated investing a single judge with the power to pass upon questions which

[8] For arbitration by summary procedure, see Pacific Settlement Convention, 1907, Articles 86-91.

parties in controversy should care to submit to his determination. Eventually the present text was adopted, largely, it is believed, because of the precedent found for it in the Draft Convention for the Court of Arbitral Justice.

It is not stated in the article that the three judges forming the special chamber shall reside at The Hague. They will presumably be chosen in such a way that they can proceed to The Hague without delay, inasmuch as the avoidance of delay is a reason for its creation. The world's business should not wait upon the court.

### Article 27

> The court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

It has been stated that summary procedure needs definition. Article 27 provides that it shall have it.

In addition, the court is authorized and required to draft the rules of procedure according to which it will exercise its jurisdiction. Doubtless it will take up these matters at its first session, as nations can not be expected to submit disputes to summary procedure without knowing how the court will proceed in such cases, and it is not to be expected that nations will resort to the full court without knowing in advance the general rules of procedure which it prescribes. In any event, prospective litigants would be aided in the presentation of their cases, as well as in their conduct, if the rules of procedure were known in advance.

### Article 28

> Judges of the nationality of each contesting party shall retain their right to sit in the case before the court.
>
> If the court includes upon the bench a judge of the nationality of one of the parties only, the other party may select from among the deputy judges, a judge of its nationality, if there be one. If there should not be one, the party may chose a judge, preferably from among those persons who have been nominated as candidates by a national group in the Court of Arbitration.
>
> If the court includes upon the bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.
>
> Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only.
>
> Judges selected or chosen as laid down in paragraphs 2 and

3 of this article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this statute. They shall take part in the decision on an equal footing with their colleagues.

It may happen that only one or the other of the parties litigant has a judge of its nationality upon the bench, or that neither party is represented by a judge of its nationality in the court. What is to be done? This question puzzled the members of the court, delayed an agreement upon its organization and, from time to time, threatened to be the rock upon which the Committee might split. The views of some members had been formed in advance on this point. They held them strongly, they expressed them forcibly, and, it must be admitted that advocates of exclusion from the court of representatives of nations with causes before it could invoke theory in their behalf. Advocates of the presence of national representatives could and did invoke expediency in support of their contention. A careful and thorough examination of the question discloses that what each sought, namely, impartial determination of questions submitted to the court, could be obtained in an international tribunal in which nations in controversy were represented, whereas in national courts, as Pascal has finely and for all time said, "It is not permitted to the most equitable of men to be a judge in his own cause."[9]

The problem of nationality cannot be avoided. The persons elected judges of the court must belong to different countries. They do not lose their nationality merely by becoming judges. Some nations appear to be unwilling, they were certainly so in the past, to agree to an international court unless there is a reasonable guarantee that they be represented in it by a person of their nationality, although not necessarily of their choice. No nation, it is believed, would willingly be a party to an international court from which persons of their nationality were to be excluded. Representatives of nations in controversy can not always be included, if the court is to consist of a limited number of judges chosen in advance of and not subject to modification upon the presentation of cases. In the early sessions more than one member of the Committee made it clear that his country would have more confidence in a court if it were represented, and the fear was expressed that no country would have complete confidence unless it had a judge of its nationality upon the bench. The question, therefore, before the Committee was how to produce the greatest confidence on the part of litigating nations—because without confidence they would not submit

[9] *Pensées de Blaise Pascal,* Léon Brunschvicg edition (Paris, 1904), Vol. II, p. 12.

cases—with a guarantee of impartiality of decision, without which the court should not be created, and if created, would be doomed to failure. If the court were for a limited number of countries, and each country were to have a judge, the question would not arise.

The members of the Committee were not without sources of information which would lead them, and did ultimately lead them, to a satisfactory conclusion. Article 15 of the International Prize Court declared that the large Powers, as they existed in 1907, should always be represented in the court. Article 16 of the same convention provided that if a belligerent Power did not have a judge upon the bench at the time of the trial and decision of the case, it could ask that "the judge appointed by it should take part in the settlement of all cases arising from the war." To avoid increasing the number of judges, lots were to be drawn for the elimination of one or more, but in no case could the judges of the great Powers be excluded, nor could the judge appointed by the lesser belligerent be affected. In addition, the belligerent captor was to be entitled "to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision." A neutral Power, party to the proceedings, or whose subject or citizen was a party, was accorded the right to appoint an assessor, who was, however, to be an expert, not a judge.

The Draft Convention for the Court of Arbitral Justice did not contain any such provision, inasmuch as the Conference was unable to agree upon the appointment of judges and thus to constitute the court. In the draft convention concluded at Paris in March, 1910, by representatives of Germany, France, Great Britain and the United States, to put into effect the draft convention recommended by the Second Peace Conference relating to the establishment of a Court of Arbitral Justice, it was provided in Article 4 that: "If a contracting Power engaged in controversy has, according to the rota, no judge sitting in the court, it may ask that the judge or substitute judge appointed by it sit with the court in judgment of the case." This project adopted the method of the Prize Court for constituting the Court of Arbitral Justice. The draft convention of 1910 was reconsidered by representatives of the four Powers in question at The Hague in July, 1910. Article 4 was retained without modification.[10]

For reasons which are irrelative to the present purpose, the Prize Court was not established, and no further attempt was made to establish

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[10] For the texts of these draft conventions of 1910, see J. B. Scott, *An International Court of Justice* (1914), pp. 91-97; *Une cour de justice internationale* (1918), pp. 136-144.

the Court of Arbitral Justice by this method. In 1914, a project was laid before and met with the approval of the Netherland Minister of Foreign Affairs, for the establishment of a Court of Arbitral Justice by and for Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, the Netherlands, and Russia. It was to consist of nine members, one to be appointed by each of the contracting Powers. It was recognized that non-contracting states might wish to avail themselves of the court. It was also recognized that they were not likely to do so unless they were placed upon an exact footing of equality, during the trial and decision of their cases, with the titular judges of the contracting Powers.[11] Article 5 of this proposed tribunal was thus worded:

If the controversy submitted to the Court of Arbitral Justice or its delegation be between a contracting and a non-contracting Power, the latter shall have the right to appoint a judge to take part in the trial and determination of the case. If the Powers in controversy be non-contracting Powers, each one thereof shall have the right to appoint a judge to take part in the trial and determination of the case.

These various documents were in the possession and therefore within the knowledge of each member of the Advisory Committee.

The proposal of Mr. Adatci made in the first session of the Committee after its formal opening, provided that a state in controversy which did not have a judge upon the bench should appoint a temporary judge to take part in the trial and determination of the case. This view ultimately prevailed. Indeed, it was bound to prevail unless the large states which happened to have judges of their nationality upon the bench would consent to withdraw their judges at the very moment when they were most desirous of having them present, namely, during the trial and disposition of cases in which these large Powers were concerned with states not represented on the court. The large states were unwilling to have the judges of their nationality withdrawn when they happened to be litigants. They were also unwilling to withdraw their judges and to appoint assessors who should take part in the trial of the cause, participate in the discussions in chambers, but who should not vote when it came to the decision of the case.

It seemed manifestly unfair, not perhaps in theory but in fact, that one litigant, large or small, should by chance of election, have a judge of its nationality, and the other party to the controversy be without a judge. If, however, a temporary judge were added to the court by a

[11] For the text of this project, see J. B. Scott, *An International Court of Justice*, pp. 98-100; *Une cour de justice internationale*, pp. 145-147.

litigant party so situated, it would seem to follow that two litigating parties without judges of their nationality should be entitled to appoint temporary judges during the trial and disposition of their cases. Expediency might suggest the presence of national judges. There were other reasons, however, which permitted, if they did not require it, and there was one sure way of overcoming the fear that the presence of national judges might affect the impartiality of decision. There was a desire on the part of some members, particularly Mr. Altamira, of Spain, and Mr. Adatci, of Japan, to have forms of civilization considered in the election of judges. There was a desire, for different reasons it may be, on the part of Mr. Adatci, Baron Descamps, and Mr. Root, to have systems of law of different countries considered in electing the judges. At bottom these were one and the same, namely, to have an understanding court; a court composed of judges who should themselves be products of the main forms of civilization and who should be trained in the principal systems of jurisprudence of the different countries of the world. This, however, was not enough, because cases presented to the court would require for their determination not only a knowledge of the principal systems of jurisprudence, but a knowledge of the system of law obtaining in the country in which the case arose and from which it came. A jurist of this nationality is most familiar with this system, and the presence of such a judge during the trial and disposition of a case so circumstanced would be of advantage to the other members of the court.

If the court consisted of a small number of judges, the presence of judges of the litigating parties might seem, at least to the public, to affect the judgment of the court. But with every increase in the membership of the court, this objection would become of less moment, until in a court of a large number of judges, the objection would be overcome, if, indeed, it would not cease to exist, and the presence of judges of the litigating parties become a positive advantage. In a case of summary procedure, in which the court is to consist of three members, representatives of the litigating parties would naturally influence the decision; in a court of five members, they would have less influence; in a court of eleven, the decision would be reached by nine indifferent persons, enlightened, but not controlled by the presence of colleagues belonging to the nations in litigation.

These views prevailed, and they are embodied in Article 28. Whatever scruples there may have been originally on the part of various members were overcome, it is believed, by the express provision suggested by Mr. Adatci and accepted by his colleagues, that the

judges appointed for a temporary purpose should possess the qualifications of titular judges, and should fulfil all the conditions required of them by the terms of the project. As finally drafted, the article was adopted without a dissenting voice.

### Article 29

> The judges shall receive an annual salary to be determined by the Assembly of the League of Nations upon the proposal of the Council. This salary must not be decreased during the period of a judge's appointment.
>
> The president shall receive a special grant for his period of office, to be fixed in the same way.
>
> Deputy judges shall receive a grant, for the actual performance of their duties, to be fixed in the same way.
>
> Traveling expenses incurred in the performance of their duties shall be refunded to judges and deputy judges who do not reside at the seat of the court.
>
> Grants due to judges selected or chosen as provided in Article 28 shall be determined in the same way.
>
> The salary of the registrar shall be decided by the Council upon the proposal of the court.
>
> A special regulation shall provide for the pensions to which the judges and registrar shall be entitled.

Persons of such eminent attainments in their different countries can not be expected to render the services asked of them without adequate compensation which shall necessarily include their traveling expenses to and from the court, except in the case of a judge residing at The Hague. Whatever the salary may be, it should not be decreased during the judge's tenure of office, as that might seem to interfere with his independence, and every judge, titular or deputy, should receive an equal salary during the performance of judicial duties.

The case of the president is a case apart. He should receive a larger salary, inasmuch as more is required of him than of any other member of the court. If he be not a resident of Holland, he will have to transfer his household gods to The Hague. The additional expenses which he must necessarily incur should be covered. Otherwise the added honor will be an added burden.

What shall be the honorarium of the judge? Lord Phillimore suggested a lump sum of six thousand pounds sterling, to whom Baron Marschall von Bieberstein, Germany's first delegate to the Second Hague Conference, would have replied, as he did in considering the same question, that "such a salary would cause a revolution" in some

of the states, which he was bold enough to mention. The salary which he considered adequate was six thousand Dutch florins, which, given the high cost of living, might at the present day produce a counter-revolution to escape the appointment. The Committee determined that the Assembly of the League of Nations should fix the salary upon the proposal of the Council, and wisely refrained from an expression of opinion on its part. The members, however, were clear in their minds that the salary should be ample and generous.

While it is fair to presume that deputy judges will not receive the same compensation as titular judges, the fact that they may be called upon at any time to attend the sessions of the court, that they must hold themselves in readiness, and that they may not be professionally engaged in pursuits which would disqualify them as judges, would suggest, if indeed it did not require, that they receive compensation irrespective of services. In addition, they should receive extra allowance when actually engaged in the performance of judicial duties as members of the court so that the salary of titular and deputy be the same under like conditions.

The registrar is also to be a salaried officer, but as his duties lie particularly within the knowledge of the court, his salary is to be fixed by the Council upon the recommendation of the court.

The compensation, however, to which a judge is entitled may not cease upon the expiration of his term of office. It is considered that nine years is a long period to take out of the life of a man already advanced in years. He must perforce cease the exclusive practice of his profession if he accept the position of judge, and he may be obliged to give it up altogether.

It seemed only fair to the Committee that the judges and the registrar should be entitled to a pension after the termination of their services. But as in the case of salary, they refrained from suggesting what the amount of one or the other might be, leaving the matter to the Assembly and the Council, indicating, however, in the last clause of Article 29 that a special regulation should provide for the pensions to which judges and registrars should be entitled.

### Article 30

> The expenses of the court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

The expenses of the court are, of course, to be borne by the League of Nations, of which the court is the judicial organ. The appropriate

officers will be charged with the duty of preparing the estimates for the forthcoming year. If they are not made by the Council, they will be presented to that body and, as in other cases, they will be submitted to the Assembly which represents all the members. Shall these expenses be borne in equal proportion by all nations, large and small alike, or shall the states be classified for this purpose, as in the Universal Postal Union? This is a question for the Society of Nations to determine.

It is of more than passing interest to note in this connection that the Five Power Plan, in February, 1920, by official representatives of the Governments of Denmark, Norway, Holland, Sweden and Switzerland, provided in its nineteenth article that the members of the League should contribute equally to the expenses of the court.

The small states have the courage of their convictions, and in accepting equality they accept its consequences even although they happen to touch the purse.

## CHAPTER II

### *Competence of the Court*

#### Article 31

The court shall have jurisdiction to hear and determine suits between states.

The first union of free, independent and sovereign states which has survived its framers and has proved adequate provides that "the judicial Power of the United States, shall be vested in one supreme Court,"[1] and that this judicial power "shall extend . . . to Controversies between two or more States."[2]

The first project for a Permanent Court of International Justice adopted by the representatives of the states in conference at The Hague in 1907, provides in its seventeenth article that "the Court of Arbitral Justice is competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement."

The first project for a permanent court for the League of Nations drafted at The Hague by an Advisory Committee of Jurists provides that "the court is competent to deal with cases between states."

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[1] Constitution of the United States, Article III, section 1.

[2] *Ibid.*, section 2.

The Constitution of the American Union created a court to supersede the temporary tribunals created under the ninth of the Articles of Confederation. The Second Hague Conference attempted to create a court to be established alongside of and to coexist with, but not to supplant, the Permanent Court of Arbitration, not unlike the temporary commissions organized under the Articles of Confederation of the United States.

The Committee of Jurists took up the project where it had been left by the Conference of 1907, and, by devising a method of appointing the judges acceptable to all of its members, and therefore likely to be acceptable to the states whereof they are subjects or citizens, and, it is to be hoped, acceptable to the states forming the League of Nations, will enable the provisions of the draft convention of 1907, revised and enlarged, to be put into effect in 1920.

The controversies to be submitted to the Supreme Court of the American Union were to be disputes of a "judiciary Nature." The cases to be submitted to the proposed court of 1907 were to be judicial, or justiciable cases. The cases to be submitted to the court of 1920 are to be controversies of a legal nature—questions which can properly become the subject of litigation in a court of justice.

In the Conference of the American States, commonly called the Federal Convention of 1787, Mr. Madison, speaking of the jurisdiction of the proposed court, asked his colleagues "whether it ought not to be limited to cases of a Judiciary Nature," and in commenting on the jurisdiction of the court, he expressed the opinion, borne out by a century and more of experience, "that the jurisdiction given was constructively limited to cases of a Judiciary nature." [3] The jurisdiction, however, of the proposed court of 1907 and of the court of 1920, although the same in nature, is in one respect more comprehensive, inasmuch as the Eleventh Amendment to the Constitution of the United States withdrew from the Supreme Court its power to entertain and to decide "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This amendment has been construed by the Supreme Court to mean that the controversy whereof it can take jurisdiction must be between states as such, not by a state on behalf of its citizens against a state of the American Union.[4]

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[3] Session of August 27, 1787, *Documentary History of the Constitution of the United States of America,* Vol. III (1900), p. 626.

[4] This question was elaborately argued, carefully considered and expressly adjudged in the *State of New Hampshire* v. *State of Louisiana* (108 United States Reports, 76, 88, 91), decided in 1883.

It is the practice of states to present through diplomatic channels the claims of their citizens or subjects against other states. It is intended that this process shall continue, and that the jurisdiction of the court shall begin where diplomacy leaves off; that is to say, the Permanent Court of International Justice is competent to assume jurisdiction of disputes of a justiciable nature which diplomacy has failed to adjust, whether the dispute is laid before the court by a state in its own behalf or acting in behalf of its subject or citizen. By espousing the cause of its national, it makes the case its own, so that the court may assume jurisdiction of it, if it be of a justiciable nature, and the state may prosecute it to judgment before the court. It is important that there be no doubt about the action of the state in the premises. It was the intention of the Committee that the state should be *dominus litis,* and that the individual had no *locus standi* in the court. The judgment, therefore, is to be a judgment of the court in favor of a state in a suit between states. The state in whose favor the judgment has been rendered disposes of the subject-matter of the judgment according to its sovereign pleasure, conveying to its subject or citizen such interest in the judgment as it pleases. Propositions were made to and rejected by the Committee to permit individuals as such to bring suits against states in cases in which the state, stepping from its sovereign capacity, had entered what might be called the domain of commerce. To entertain a suit of this kind, therefore, the state whereof the claimant is a subject or citizen must espouse and present the claim in its own behalf. Under these circumstances the state naturally frames the issue and assumes the conduct of the case before the court. To what extent it may consult its citizen or subject, or associate this citizen or subject with the preparation of the case before presentation or its conduct before the court, is a matter for the state and for the state alone to determine.

As will be presently seen, the Permanent Court of International Justice only assumes jurisdiction of a case which diplomacy has failed to adjust. It therefore follows that cases submitted to its jurisdiction are such that a state could properly present another state through its diplomatic channels. These cases will be largely, if not always, claims of its citizens or subjects. They may, however, be claims of citizens or subjects of other states to which by the practice of nations, by treaty, or

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If, however, an individual cedes his interest in and title to a claim to a state of the American Union, that state can sue in its own name and behalf. This was expressly so held, upon great deliberation, in *State of South Dakota* v. *State of North Carolina* (192 United States Reports, 286), decided in 1904.

special agreement, a state may accord diplomatic protection. Such cases are special. A case in point is the protection accorded to racial, religious or linguistic minorities by recent treaties, which accord the right of a foreign state to espouse the cause of the minorities in question and to lay the dispute before the Permanent Court of International Justice.

In addition to jurisdiction of disputes concerning minorities, the court, under the Treaty of Versailles and other Peace treaties of 1919, "is also competent," to quote from the Report of Mr. de Lapradelle, "in those cases in which treaties make it the court of appeal against the decisions of the International River Commissions; it is also competent to deal with the cases mentioned in the provisions dealing with the formation of an International Labor Organization. It would have been easy (Mr. de Lapradelle continues) for the Committee to enumerate all these cases, but it was thought unnecessary to indicate them in detail."

Without general or special convention the jurisdiction of the Permanent Court of International Justice is limited to disputes of a justiciable nature between states.

### Article 32

> The court shall be open of right to the states mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations.
>
> Other states may have access to it.
>
> The conditions under which the court shall be open of right or accessible to states which are not members of the League of Nations shall be determined by the Council, in accordance with Article 17 of the Covenant.

As far as the Covenant of the League of Nations is concerned, there are three classes of states: first, the signatories of the various treaties of peace putting an end to the World War, the names of which are appended to the Covenant (these are called the original members of the League); secondly, the states invited to adhere to the League, also included in the annex to the Covenant (these are likewise called original members); thirdly, states not enumerated in the annex to the Covenant (these are Germany, Austria, Bulgaria, Hungary, Costa Rica, Dominican Republic, Mexico, Russia and Turkey, and such other states as may be subsequently recognized). Article 32 of the project opens the court as of right to the states mentioned in the annex to the Covenant, and to such others as may subsequently enter the League of

Nations. That is to say, the court is open to the states mentioned in the annex, although they may not have ratified the Covenant. This is the situation of the United States. It is also open to members of the League; that is to say, to states which enter the League although they may not be mentioned in the annex to the Covenant. States not members of the League, other than the United States, are only to have access to it.

It is necessary that the court be open to all members of the League, for it is their court. It is desirable that it be accessible to all other states, inasmuch as the reason for the establishment of a Permanent Court of International Justice is that all disputes of a justiciable nature be submitted by all states to the decision of the court. Notwithstanding the desire of the Committee to distinguish between the United States on the one hand, mentioned in the annex to the Covenant, and the other states not so mentioned, which may wish to use the court, the fact is that they are alike in that they are not yet members of the League, and that they can only avail themselves of the court "upon such conditions as the Council may deem just," to quote the language of Article 17 of the Covenant.

### Article 33

> When a dispute has arisen between states, and it has been found impossible to settle it by diplomatic means, and no agreement has been made to choose another jurisdiction, the party complaining may bring the case before the court. The court shall, first of all, decide whether the preceding conditions have been complied with; if so, it shall hear and determine the dispute according to the terms and within the limits of the next article.

Inasmuch as the court is not a substitute for diplomatic negotiation, but is to supplement it by deciding disputes which diplomacy has been unable to adjust and which the states in controversy may submit, it necessarily follows that diplomatic means shall have been tried and found wanting. Otherwise the court would be a rival, instead of a successor.

It may be that the parties in dispute have agreed to submit their differences to a particular forum. In such a case, that jurisdiction is to be resorted to. If, notwithstanding the previous agreement, the parties prefer the court, they may submit the case, and the court will assume jurisdiction, but it will be by virtue of the new, and in spite of the old, agreement.

Upon the presentation of a case, the court must first determine whether these conditions precedent have been complied with. Article 33 so prescribes. If the court decide that these two conditions have been fulfilled, it would immediately find itself confronted with the further question, whether it had jurisdiction of the parties and the subject-matter of the dispute.

As the Permanent Court of International Justice is a court of limited jurisdiction, it naturally follows that it must, itself, determine its power to hear and determine a cause, even though the parties to it should not contest its jurisdiction. For without jurisdiction its action is a nullity, and its judgment void.[5] What is this jurisdiction and what are its limits? This is the question with which Article 34 of the project deals.

ARTICLE 34

> Between states which are members of the League of Nations, the court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature concerning:
>
> (*a*) The interpretation of a treaty;
> (*b*) Any question of international law;
> (*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;
> (*d*) The nature or extent of reparation to be made for the breach of an international obligation;
> (*e*) The interpretation of a sentence passed by the court.
>
> The court shall also take cognizance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties.
>
> In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the court.

This article consists of four parts, each of which is of fundamental importance: first, that the court is competent to hear and determine

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[5] In the leading case of *The State of Rhode Island* v. *The State of Massachusetts* (12 Peters, 657, 720), decided in 1838, Mr. Justice Baldwin, speaking for the Supreme Court of the United States, said: "But as this Court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed, is coram non judice, and its action a nullity. . . . And whether the want or excess of power is objected by a party, or is apparent to the Court, it must surcease its action, or proceed extra-judicially." See, also, *United States* v. *State of Texas* (143 United States Reports, 621, 642), decided in 1892.

certain cases of a legal nature between states belonging to the League of Nations, without a special convention or agreement to that effect; secondly, that the cases are of a justiciable nature, involving and arising under one or the other of the five specified categories of jurisdiction; thirdly, that the court is competent to hear and determine all other disputes which may be submitted to it by agreement of the parties; fourthly, that the court shall decide whether the case presented to it falls within the above categories. Each of these questions will be considered somewhat in detail.

With but one dissenting voice, the Committee was of the opinion that a state belonging to the League of Nations should, on its own initiative, be able to summon another state, also belonging to the League, before the Permanent International Court of Justice to litigate a judicial question concerning the subjects mentioned in Article 34.

The ground upon which this opinion was based is that by Article 13 of the Covenant, the members of the League agree "that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration"; that the four categories of disputes specified under *a, b, c,* and *d,* "are declared," by Article 13, "to be among those which are generally suitable for submission to arbitration"; that the interpretation of the judgment of the court is a question which the parties to the Second Hague Conference had agreed in case of difference to submit to the tribunal deciding it. In the opinion of the majority of the Committee, the members of the League between and among themselves are either bound by their acceptance of Articles 13 and 14 of the Covenant to submit disputes of this category to arbitration (used in an untechnical sense as including judicial settlement), or by agreeing to the present article, which is a general consent to suit on the part of the States accepting it, so that a separate and special convention between the parties to this effect is unnecessary. On this theory the parties would not need to *consent* to submit a specific dispute, as each would be *bound* to do so. Therefore it would seem to follow that one of the parties could, in the absence of a separate and special convention or of special consent, lay the case before the court, which is competent to receive it, and that the court, being competent, could not only entertain the case, but could, at the request of the complaining state, proceed to decide it in the absence of the defendant state invited to appear before the court.

The dissenting member of the Committee, Mr. Adatci, of Japan, admitted that the court was competent to accept and to decide disputes

of the above categories, but he maintained that it could only be set in motion in accordance with Article 14 of the Covenant, which provided in express terms, that "The court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it."[6]

The difference between these two views is the difference between a court of justice and a court of arbitration,—the court of justice not requiring consent of the parties to the suit, inasmuch as they are bound to submit to the court within the limits of its jurisdiction; the court of arbitration, on the other hand, requiring an agreement of the parties upon the specific question to be submitted to the court. Up to this point, the essential difference between the Permanent Court of Arbitration of 1899 and the Permanent Court of International Justice of 1920, is one of the organization and composition of the court. A change in the categories of disputes *declared to be subject to arbitration or judicial decision,* by special convention, would not improve matters, inasmuch as nations are always at liberty to submit disputes of any kind to arbitration or judicial decision by special agreement. The important point is, that *they oblige themselves* to submit a small part of the large field, reserving the right by future agreements to submit questions which are not included within this limited and compulsory field. The unwillingness to submit to judicial decision disputes falling within the limited field, is also an unwillingness to submit these very disputes to arbitration. The objection is not one of form, it is one of substance. It is a rejection of the principle that disputes of a recognized justiciable nature should be submitted either to judicial or arbitral decision; a refusal to have such international dispute decided by principles of justice known in advance, by any agency created and existing in advance, unless it should please the passing fancy of the parties in controversy to do so.

With the exception of one of its members, the Committee was willing to recommend the acceptance of this obligation; some believing that it already existed by acceptance of the Covenant, and others believing that the approval of this article of the project by the Council

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[6] Mr. Ricci-Busatti voted against Articles 34 and 35, as he preferred the voluntary jurisdiction of a tribunal of arbitration to the obligatory jurisdiction of a court of justice. He voted, however, on July 22d for the project as a whole without a formal reserve as to these articles. By so doing he sacrificed his preference to the judgment of the majority. It is probably fair to consider him as abstaining instead of recording him as in favor or as finally opposed to these two articles of the project.

and Assembly would, in effect, be a general or special convention of the members of the League, confirming or creating the jurisdiction in question.

Mr. Adatci, however, stood firm and at the moment of the adoption of the project as a whole on July 22d he formally recorded his "dissent from the provisions of Articles 33 and 34, which deal with the question of unilateral action before a compulsory international jurisdiction." In so doing he expressed the hope that compulsory jurisdiction would be accepted in the very near future, but in view of the history and express wording of Article 14 of the Covenant, which conditioned a resort to the court upon the agreement of the parties, he felt himself bound to reject Articles 33 and 34 as beyond the mandate under which he was acting.

In the opinion of the majority, therefore, the approval of this article of the project would dispense with a special agreement or *compromis,* and would enable one or other of the parties to a dispute of the kind specified in the article, to lay it before the court, to be decided by the judges under a sense of judicial responsibility and in accordance with the principles of law held to be applicable, in the presence or absence of the other party to the controversy.

Lord Phillimore and Mr. Root were much opposed to the idea of a special agreement or *compromis,* in vogue in arbitration but alien to judicial procedure. The requirement that the parties in controversy agree upon the issue or issues to be submitted to the decision of the court is to ask that two parties in disagreement agree on the very point upon which they are at odds. Lord Phillimore aptly called attention to the fisheries dispute between Great Britain and the United States, in which those two countries were unable to agree upon the points to be arbitrated. Therefore, in the special agreement of January 27, 1901, each country stated its contentions and the special tribunal of arbitration at The Hague decided the controversy upon the contentions of the parties separately stated in the *compromis.* Mr. Root was then Secretary of State and negotiated the agreement on behalf of the United States. Because of this experience and subsequent reflection he would reject the special agreement required in arbitration and allow plaintiff and defendant to state their respective cases separately as in judicial procedure. "Instead of requiring the parties to agree upon the question to be determined, the party seeking a decision against the other should state its case itself, in its own way; and the other party should state its counter-case itself, and in its own way; and let the court decide,

instead of requiring the parties to agree before hand upon the question which is to be decided."[7]

The competence of the court under this article would be very broad, but it would not be without precedent. The Pacific Settlement Convention of 1899, negotiated and ratified by twenty-six nations, including therein Japan, stated that:

In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.[8]

And in 1907, the forty-four Powers participating in the labors of the Second Hague Conference were unanimous—

1. In admitting the principle of compulsory arbitration.

2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction.[9]

The obligation to submit a dispute involving any question of international law is reasonable in that international law is not the law of any one nation, but is the law of every nation. If authority be needed, that of Daniel Webster, speaking as Secretary of State, is sufficient for the United States, and the statement applies not merely to the United States, but to every nation, young or old, large or small:

Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war.[10]

The only objection on the part of civilized governments to submit

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[7] *Procès-verbal,* session of June 29, 1920.

[8] Article 16.

[9] Final Act of the Second Hague Peace Conference of 1907.

[10] Mr. Webster, Secretary of State, to Mr. Thompson, Minister to Mexico, April 15, 1842. *The Works of Daniel Webster,* Vol. VI (1851), p. 437; John Bassett Moore, *A Digest of International Law* (1906), Vol. I, p. 5.

their disputes arising from "those principles, laws, and usages which have obtained currency among civilized states" should be to the adequacy of the court by which disputes of the kind specified are to be decided. If this tribunal is so constituted as to administer justice impartially, according to the rules of law, there should not, it is believed, be an objection on the part of "civilized governments," to use Daniel Webster's phrase; certainly the objection should not come from the United States, whose Supreme Court is not only a prototype, but is in fact a Permanent Court of International Justice, administering in regular course the law of nations.[11]

In regard to the existence of a fact which, if established, would constitute a breach of an international obligation, it is sufficient to say that, in the experience of mankind, courts are the best agencies and instrumentalities for determining facts which, if established, would constitute a breach of an obligation, inasmuch as every civilized nation has created *courts to establish the existence* of facts constituting a breach of an obligation and to repair the breach according to the principles of law found applicable. If each nation has created a national court to find not merely facts which constitute the breach of an obligation, but to decide the nature or extent of reparation to be made, all nations can create a permanent court of international justice for the breach of an obligation to which the nations themselves are parties.

Good faith requires the performance of the award of an arbitral tribunal or the judgment of a court of justice. The twenty-six nations taking part in the First Hague Conference declared that "the arbitration convention implies the engagement to submit loyally to the award," [12] and the forty-four nations represented in the Second Hague Conference likewise declared that "recourse to arbitration implies an engagment to submit in good faith to the award."[13] The award, however, may be ambiguous, and each party may in good faith interpret it differently. Foreseeing the possibility of this state of affairs, and to put the meaning of the award and its execution beyond question, the forty-four nations represented in the Second Hague Conference declared that: "Any dispute arising between the parties as to the interpretation and

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[11] "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."—*The Paquete Habana,* decided in 1899 (175 United States Reports, 677, 700).

[12] Pacific Settlement Convention of 1899, Article 18.

[13] Pacific Settlement Convention, revision of 1907, Article 37.

execution of the award shall, in the absence of an agreement to the contrary, be submitted to the tribunal which pronounced it.[14]

This enumeration of the disputes to be submitted to the court, as Mr. Root said to the Advisory Committee at its session of June 26th, "was not conceived in the inner consciousness of the gentlemen in Paris" who drafted the Covenant. "It was a statement," he continued, and he knew, for he himself prepared the draft which was embodied in Article 13 of that document, "that had resulted from long discussion and conference among the international jurists of many countries."[15]

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[14] Pacific Settlement Convention, revision of 1907, Article 82.

[15] The original draft prepared by Mr. Root was the first of a series of amendments to the original draft of the Covenant for the League of Nations proposed by him in a letter of March 29, 1919, to Mr. Will H. Hays (*American Journal of International Law*, Vol. 13, No. 3, p. 580). It was worded as follows:

> The high contracting powers agree to refer to the existing Permanent Court of Arbitration at The Hague, or to the Court of Arbitral Justice proposed at the Second Hague Conference when established, or to some other Arbitral Tribunal, all disputes between them (including those affecting honor and vital interests) which are of a justiciable character, and which the powers concerned have failed to settle by diplomatic methods. The powers so referring to arbitration agree to accept and give effect to the award of the Tribunal.
>
> Disputes of a justiciable character are defined as disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the nature and extent of the reparation to be made for any such breach.
>
> Any question which may arise as to whether a dispute is of a justiciable character is to be referred for decision to the Court of Arbitral Justice when constituted, or, until it is constituted, to the existing Permanent Court of Arbitration at The Hague (*ibid.*, p. 594).

The channel through which Mr. Root's proposed amendments to the Covenant reached the Peace Conference at Paris was thus explained by him at the meeting of the Executive Council of the American Society of International Law, on April 17, 1919:

> I wrote a letter some time ago on the general subject to Mr. Hays, and proposed half a dozen amendments. The State Department asked for those amendments, and they were furnished to it some time before the letter was sent. The Department cabled the amendments over to Mr. Lansing in Paris, and they were before the commission that was revising the Covenant (*Proceedings of the American Society of International Law*, 1918-1919, p. 50).

Mr. Root on the same occasion thus explained the origin of the amendment in question:

The majority of the Committee regarded the enumeration of disputes to be submitted to the court as a first step. But how is the jurisdiction of the court to be extended? This involves the further question, How are questions which may now be regarded as political questions to become legal, judicial or justiciable questions?—to use the three terms commonly employed in this connection. The Committee, unconsciously no doubt, adopted the method defined and applied by the Supreme Court of the United States. "The court," said the Committee, "shall also take cognizance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties." The Supreme Court, in a bitterly contested suit between the States of Rhode Island and Massachusetts, held that a political dispute becomes a judicial question by the agreement of the parties to submit the dispute in question, and its actual submission, to a court of justice. Thus, Mr. Justice Baldwin said:

The founders of our government could not but know, what has ever been, and is, familiar to every statesman and jurist, that all controversies between nations, are, in this sense, political and not judicial, as none but the sovereign can settle them. . . . None can be settled without war or treaty, which is by political power; but under the old and new confederacy, they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before. We are thus pointed to the true boundary line between political and judicial power, and questions. A sovereign decides by his own will, which is the supreme law within his own boundary (6 Pet. 714; 9 Ibid. 748); a court, or judge, decides according to the law prescribed by the sovereign power, and

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That amendment relating to arbitration is in the language of the British group, of which Mr. Bryce is the head. They have been working at it for three or four years, and that definition is what their work finally resulted in. It recognizes the Hague Court and defines justiciable questions. In framing the amendment I took their language, instead of the language of the League to Enforce Peace, for the reason that the former defines justiciable questions, and the latter does not, and I had found great difficulty in an agreement to submit to any Continental tribunal—any tribunal selected from the world at large—the question of its own jurisdiction, without any rule to apply more definite than the words "justiciable questions." . . . But the Bryce group defined disputes of a justiciable character to be disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the nature and extent of the reparation to be made for any such breach. That is pretty reasonably clear-cut (*Proceedings of the American Society of International Law*, 1918-1919, p. 52).

that law is the rule for judgment. The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the sic volo, sic jubeo, of political power; it comes to the court to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.

It has never been contended that prize courts of admiralty jurisdiction, or questions before them, are not strictly judicial; they decide on questions of war and peace, the law of nations, treaties, and the municipal laws of the capturing nation, by which alone they are constituted; a fortiori, if such courts were constituted by a solemn treaty between the state under whose authority the capture was made, and the state whose citizens or subjects suffer by the capture. All nations submit to the jurisdiction of such courts over their subjects, and hold their final decrees conclusive on rights of property. 6 Cranch 284-5.

These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation (3 Ves. 429); the latter is that which is granted to a court or judicial tribunal. So of controversies between states; they are in their nature political, when the sovereign or state reserves to itself the right of deciding on it; makes it the "subject of a treaty, to be settled as between states independent," or "the foundation of representations from state to state." This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the equum et bonum of the case, let who or what be the parties before them.[16]

Finally, Mr. Root made the following suggestion regarding the development of the jurisdiction of the court:

I think we should endeavor to take the further step of marking the distinction which is not considered or expressed in the provisions regarding the Council—the further step of marking the distinction between questions of right and questions of policy, and, within these narrow limits, of calling upon the nations of the earth to agree: that the questions of right based on contract or positive law shall go to a court which shall decide judicially; and I think we can accompany that provision by a strong recommendation to the Council and the Assembly that with the least possible delay the process which began with the first, continued with the second, and was about to be further continued

[16] 12 Peters, 657, 736. Decided in 1838.

in the third Hague Conference shall be recommenced; a recommendation that with the least practicable delay another general Conference be called for the purpose of reconsidering the principles of international law of considering and declaring what is left of them since the war—of the rules formerly accepted which have been weakened, so that the world may know what its law is, and for the purpose of extending agreement upon the rules of law.

If that could be done and the rule could be adopted that such a Conference shall take place at stated intervals, then our court, having jurisdiction over questions of positive law as distinguished from vague considerations of justice, will, year after year and generation after generation, be exercising continually enlarging jurisdiction, each new agreement upon the rules of law adding to the jurisdiction of the court, and we will have begun an institution which for centuries to come will become of constantly increasing value. You will find in the decisions of such a court charged with the maintenance of law a check upon the undue exercise of power—political power, unregulated by law, with no law that it is bound to respect, a power which makes it especially important that the law shall be developed and respected and made the object to which the thoughts of man shall turn for a guide for their conduct.

If the government of Japan should share the views of the Japanese member, or if the Italian government should share the views of its member, or if other governments should incline to these views, the Powers wishing to vest the Court with jurisdiction without a special agreement or *compromis* in each case, need only negotiate a convention to this effect with those Powers to which they may be willing to accord this right.

If the nations reject this provision of the project, the members of the Advisory Committee may nevertheless have the consolation that their actions square with the advice of General Washington, who said of the acceptance or rejection of the Constitution of the United States:

> It is too probable that no plan we propose will be adopted. Perhaps another dreadful conflict is to be sustained. If to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and the honest can repair. The event is in the hand of God.[16]

### Article 35

> The court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following:

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[16] Gouverneur Morris, An Oration upon the Death of General Washington, December 31, 1799. Max Farrand, *The Records of the Federal Convention of 1787* (1911), Vol. III, p. 382.

(1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(2) International custom, as evidence of a general practice, which is accepted as law;
(3) The general principles of law recognized by civilized nations;
(4) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Recognizing that a step was being taken in advance, although that step might not be a very great one, the Committee was anxious to quiet the apprehensions of the parties that the judges might make an undue use of their power and, by the interpretation of their jurisdiction, assume the rôle of legislator. This they did by Article 35.

There is no difficulty with the first section of this article. An international convention only binds the parties to it, and it is only law for them. Hence, the provisions of this section bind only the states in controversy which may be parties to such a law-making convention.

Sections 2, 3 and 4 of the article are not only acceptable in themselves but seem to be in accordance with the decisions of English and American courts of justice, both as to the law and as to the rules of interpretation.

First as to English precedent.

Lord Chancellor Talbot is reported by Lord Mansfield to have held in the case of *Buvot* v. *Barbut,* decided in 1736, "That the law of nations, in its full extent was part of the law of England," and "was to be collected from the practice of different nations, and the authority of writers." [17]

The Law Officers of the Crown, including the great Lord Mansfield, then Solicitor General, referred in their Report, dated January 8, 1753, on the Silesian Loan, to "The Law of Nations, founded upon Justice, Equity, Convenience, and the Reason of the Thing, and confirmed by long Usage." [18]

Lord Chief Justice Mansfield declared in *Heathfield* v. *Chilton,* decided in 1767, that, "The privileges of public ministers and their retinue depend upon the law of nations; which is part of the common law of England. And the Act of Parliament of 7 Ann. C. 12 did not intend to alter nor can alter the law of nations." [19]

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[17] *Triquet* v. *Bath* (3 Burrow, 1478, 1480-81), decided in 1764.
[18] Sir Ernest Satow, *The Silesian Loan and Frederick the Great* (1915), p. 82.
[19] 4 Burrow, 2016.

Sir John Stuart, Vice Chancellor, held in *The Emperor of Austria* v. *Day and Kossuth,* decided in 1861, that:

A public right, recognized by the law of nations, is a legal right; because the law of nations is part of the common law of England.

These propositions are supported by unquestionable authority. In the modern version of Blackstone's Commentaries (4 Steph. Com. 282) it is laid down (and it has so always been held in our Courts) that the law of nations, wherever any question arises, which is properly the object of its jurisdiction, is adopted in its full extent by the common law of England, and held to be a part of the law of the land. Acts of Parliament, which have been from time to time made to enforce this universal law, or to facilitate the execution of its decisions, are not considered as introductive of any new rule, but merely declaratory of the old fundamental constitution of the kingdom, without which it must cease to be part of the civilized world.[20]

Lord Chief Justice Alverstone, in *West Rand Central Gold Mining Company* v. *The King,* decided in 1905, said on behalf of a unanimous court:

The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration: "What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized States have agreed shall be binding upon them in their dealings with one another." In our judgment, the

[20] 2 Gifford, *Cases adjudged in the High Court of Chancery,* pp. 628, 678-679.

second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance, *Barbuit's Case* [Cas. t. Tal. 281], *Triquet* v. *Bath* [3 Burr. 1478], and *Heathfield* v. *Chilton* [4 Burr. 2016] are cases in which the Courts of law have recognised and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when dealing with the particular and recognised rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and a fortiori if they are contrary to the principles of her laws as declared by her Courts.[21]

Passing from English to American precedent.

In 1784, Mr. Chief Justice McKean, of Pennsylvania, held in the case of *Respublica* v. *De Longchamps,* that the Secretary of the French Legation was entitled to all the immunities of a minister. In sentencing the defendant, who had been found guilty of the offenses with which he was charged, Chief Justice McKean said:

The first crime in the indictment is an infraction of the law of Nations. This law, in its full extent, is part of the law of this State, and is to be collected from the *practice* of different Nations, and the *authority* of *writers.*

The *person* of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations;—he is guilty of a crime against the whole world.[22]

In 1796, Mr. Justice Chase, of the Supreme Court of the United States, said, in *Ware* v. *Hylton:*

The law of nations may be considered of three kinds, to wit, *general, conventional,* or *customary.* The *first* is *universal,* or established by the general consent of mankind, and binds *all nations.* The *second* is founded on *express* consent, and is not universal, and only binds those nations that have assented to it. The *third* is founded on TACIT consent; and is only obligatory on those nations, who have adopted it.[23]

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[21] Law Reports, King's Bench Division, Vol. 2 (1905), 391, 406-408.

[22] 1 Dallas, 111, 116.

[23] 3 Dallas, 199, 227.

In the same case, Mr. Justice Wilson said that, "When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." [24]

In 1815, Mr. Chief Justice Marshall, speaking for the court in *Thirty Hogsheads of Sugar* v. *Boyle,* said:

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.[25]

In 1900, Mr. Justice Gray said on behalf of the court in *The Paquete Habana:*

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[26]

In the same case, commenting upon a statement by Lord Stowell in *The Young Jacob and Johanna* (1 C. Rob. 20), decided in 1798, that a certain rule of capture was a rule of comity only, and not of legal decision, Mr. Justice Gray said:

The word "comity" was apparently used by Lord Stowell as synonymous with courtesy or good will. But the period of a hundred

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[24] 3 Dallas, 281.

[25] 9 Cranch, 191, 198.

[26] 175 United States Reports, 677, 700.

years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. As well said by Sir James Mackintosh: "In the present century a slow and silent, but very substantial mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage, and becomes part of the law of nations." Discourse on the Law of Nations, 38; 1 Miscellaneous Works, 360.[27]

ARTICLE 36

> The court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.
>
> When the court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special commission of from three to five members.
>
> When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.

According to Article 14 of the Covenant, the Permanent International Court of Justice is to fulfil a two-fold purpose. First, it is declared to be competent "to hear and determine any dispute of an international character which the parties thereto submit to it"; secondly, it may also "give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

In the first case, it acts as a court upon a case submitted to it by the parties in litigation, and renders a judgment which decides the question and binds the parties. In the next case, it renders an advisory opinion upon a case stated to it by the Council or Assembly. The case stated may be hypothetical or it may be actual; hypothetical in the sense that it is not a dispute between two states; actual in the sense that it may be a dispute submitted to the Council or Assembly by the parties in controversy, which, however, have not submitted it to the court. Either body may refer the dispute to the court for its opinion. In the first of these two cases, the court does not act as such; it does not need to sit as a complete body. It can meet the requirements of the situation by the appointment of a committee, and Article 36 provides that in such a case, a Committee of from three to five

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[27] 175 United States Reports, 694.

members will be competent. The special commission of three members provided for by Article 26, to be appointed annually, may be utilized for this purpose. In the case, however, of an actual dispute submitted to the court by the Council or the Assembly, the court should sit as a court acting under a sense of judicial responsibility, and render its opinion in the form of a judgment.

This very happy analysis of the situation was made and drafted by Mr. de Lapradelle in the Drafting Committee, and reported to the Advisory Committee by that body and accepted in the form in which it was submitted.

Advisory opinions are not strangers in the English-speaking world: they have been requested and given for centuries in Old England and in most of the states of New England from colonial days down to and including the present. The practice obtains in Massachusetts, New Hampshire, Maine and Rhode Island, and in the newer states of Florida, Colorado and South Dakota, some seven in all.[28] In the United States, the practice is confined to the states and only in those mentioned. It is unknown in the Government of the Union in which by custom the judges are, in Mr. Root's language, "judicial officers and nothing else."[29] But wherever rendered, whether in England or in the states of the United States, the opinions are "advisory." They are not judgments. They may be given on an actual or hypothetical case, or on abstract questions of existing law.

In a very learned opinion given by the judges of Massachusetts and understood to have been drawn by Chief Justice Gray (later a Justice of the Supreme Court of the United States), it is said that the article in the Constitution of Massachusetts requiring advisory opinions "evidently had in view the usage of the English Constitution, by which the King, as well as the House of Lords, whether acting in their judicial

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[28] *See* James Bradley Thayer, "Memorandum on the Legal Effect of Opinions given by Judges to the Executive and the Legislative under certain American Constitutions," 1885, reprinted under the caption of "Advisory Opinions" in his *Legal Essays* (1908), pp. 42-59.

[29] Thayer, referring to early attempts of the Executive to obtain an expression of opinion from the judges of the Supreme Court on points referred to them, says:

> "Considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them. . . . As it is, we may now read in 2 Story, Const. s. 1571, that while the President may require the written opinion of his Cabinet, 'he does not possess a like authority in regard to the judicial department'" (*Legal Essays,* 1908, pp. 53-54).

or in their legislative capacity, had the right to demand the opinions of the twelve judges of England."[30] As to the origin and nature of the opinions so given the great authority on such matters says: "The giving of such opinions by judges is not an exercise of the judicial function. The relation of the English judges to the king, in former days, and their ancient place as assistants to the House of Lords, led to a practice, on the part of that House, as well as the king, of calling on them for advisory or 'consultative' opinions." [31]

In Anglo-American practice arguments of counsel play a great rôle and a case decided without argument is rarely looked upon as possessing the authority of one in which the judges have had help from counsel. For this reason the unaided opinions of the judges are held by the judges to be merely in the nature of advice and to have no weight as precedents.[32]

## CHAPTER III

### *Procedure*

#### Article 37

The official language of the court shall be French.

The court may, at the request of the contesting parties, authorize another language to be used before it.

Heretofore the project has dealt with the organization of the court and its jurisdiction. We now have a court "in being," to press into the service of justice a much quoted naval phrase. But the court is for use, not ornament, and to be used, it is for the convenience both of the court and of the parties appearing before it that the procedure should be defined and known in advance.

The draft convention for the Court of Arbitral Justice provided in Article 22, that that court should follow "the rules of procedure laid down in the Convention for the pacific settlement of international disputes, except in so far as the procedure is laid down in the present

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[30] Opinion of the Justices of the Supreme Judicial Court of Massachusetts, 1878 (126 Mass., 557, 561).

[31] "This may be traced very far back in our records, *e. g.*, in 1387 (2 Stat. Realm, 102-104), King Richard VI puts to his judges a long string of questions." James Bradley Thayer, *Cases on Constitutional Law* (1895), Vol. I, p. 175.

[32] Certificate of the judges respecting the Court Martial proposed to be held upon Lord George Sackville (1760), 2 Eden, Appendix, p. 371; *Taylor* v. *Place*, 1856, 4 Rhode Island, 324, 362.

Convention." The representatives of the Five Powers, namely, Sweden, Norway, Denmark, Holland and Switzerland, who met at The Hague in the month of February, 1920, and drafted the so-called "Five Power Plan," completed its project by a section on procedure, drawing upon the rules laid down in the Pacific Settlement Conventions of 1899 and 1907, and the Draft Convention for the Court of Arbitral Justice of 1907, which its members believed applicable to a Permanent Court of Justice as contemplated by Article 14 of the Covenant.

The Pacific Settlement Convention of 1899, and its revision of 1907, the Draft Convention for the Court of Arbitral Justice, the Prize Court Convention and the Five Power Plan were before the members of the Advisory Committee. In informal sessions, the Five Power Plan was adopted as the basis of discussion, and a project based upon it with reference to the other texts was prepared. This was submitted to the Drafting Committee, which made further modifications. The report of the Drafting Committee was made the basis of discussion in the Advisory Committee, and with sundry amendments and additions is embodied in the project under the caption of "Procedure."

At the outset, it is necessary that the court and parties litigant should understand one another. This can only be where they use a language common to all. What is this language to be? This could not be doubtful to any one who has had the slightest experience in international affairs. The Advisory Committee was unanimous for French without voting for any other tongue. They simply registered the fact that French is to-day the language of the polite world, of the diplomatic world, of international conferences, and, therefore, of the Permanent Court of International Justice.[1] However, the use of any one language

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[1] David Hume's advice to his friend, Edward Gibbon, to use English instead of French in his proposed compositions was sound, but his prediction, made in 1767, amid the general rejoicing over the conquest of Canada from France, that English would displace French, still awaits complete fulfilment.

In the course of a letter to the historian Gibbon, who fortunately followed his advice, Hume has this passage, interesting alike to French and English readers and not irrelevant to the subject in hand:

> Let the French, therefore, triumph in the present diffusion of their tongue. Our solid and increasing establishments in America, where we need less dread the inundation of Barbarians, promise a superior stability and duration to the English language [Mr. Hume to Mr. Gibbon, October 24, 1767. *The Memoirs of the Life of Edward Gibbon with various Observations and Excursions by Himself*, edited by George B. Hill (1900), Appendix No. 30, p. 310].

should not prejudice the use of another if it be the desire of the litigants appearing before the court to make use of a language other than French. This the court may, according to the express terms of Article 37, grant, but it will assuredly only permit it when its members understand the

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After the Independence of the American Colonies produced in large measure by the timely intervention of France in a critical moment, one Antoine Rivarol entered the lists in behalf of France and the French language.

The occasion was a prize offered by the Academy of Berlin in 1783 on the following subject: "What has rendered the French language universal? Why does it merit this preeminence? Will it be maintained?"

In competition for this prize which he obtained, Rivarol wrote his famous "Discourse on the Universality of the French Language," in the course of which he said:

> Voyons maintenant si le génie et les écrivains de la langue anglaise auraient pu lui donner cette universalité qu'elle n'a point obtenue du caractère et de la réputation du peuple qui la parle. Opposons sa langue à la nôtre, sa littérature à notre littérature, et justifions le choix de l'univers. . . :
>
> Ce n'est point l'aveugle amour de la patrie ni le préjugé national qui m'ont conduit dans ce rapprochement des deux peuples: c'est la nature et l'évidence des faits. . . .
>
> Il me reste à prouver que, si la langue française a conquis l'empire par ses livres, par l'humeur et par l'heureuse position du peuple qui la parle, elle le conserve par son propre génie. . . .
>
> Mais la langue française, ayant la clarté par excellence, a dû chercher toute son élégance et sa force dans l'ordre direct; l'ordre et la clarté ont dû surtout dominer dans la prose, et la prose a dû lui donner l'empire. Cette marche est dans la nature: rien n'est en effet comparable à la prose française. . . .
>
> Elle est, de toutes les langues, la seule qui ait une probité attachée à son génie. Sûre, sociale, raisonnable, ce n'est plus la langue française, c'est la langue humaine; et voilà pourquoi les puissances l'ont appelée dans leurs traités: elle y règne depuis les conférences de Nimègue, et désormais les intérêts des peuples et les volontés des rois reposeront sur une base plus fixe; on ne sèmera plus la guerre dans des paroles de paix. . . .
>
> Les Etats se renverseront, et notre langue sera toujours retenue dans la tempête par deux ancres, sa littérature et sa clarté, jusqu'au moment où, par une de ces grandes révolutions qui remettent les choses à leur premier point, la nature vienne renouveler ses traités avec un autre genre humain. . . .
>
> Cependant l'Angleterre, témoin de nos succès, ne les partage point. Sa dernière guerre avec nous la laisse dans la double éclipse de sa littérature et de sa prépondérance, et cette guerre a donné à l'Europe un grand spectacle. On y a vu un peuple libre conduit par l'Angleterre à l'esclavage, et ramené par un jeune monarque à la liberté. L'histoire de l'Amérique se réduit désormais à trois époques: égorgée par l'Espagne, opprimée par l'Angleterre et sauvée par la France. Rivarol, "De l'universalité de la langue française," in the *Oeuvres choisies de A. Rivarol,* M. de Lescure, ed. (1880), Vol. I, pp. 26, 42, 43, 47-8, 51, 52, 60-1.

language which the parties litigant propose to use. Otherwise, justice might suffer.

It is really no hardship to the parties litigant, even though they both belong to the English-speaking peoples; it is no hardship to the nineteen nations using Spanish as their mother-tongue, to use French. Each government in litigation need only select agents or advocates possessing a knowledge of French, and even in the improbable case that they are unable to find any to their liking at home, there are many able, capable and upright French lawyers of eminence who would gladly accept a brief from a foreign country.

The use of French as the official language of the court means, of course, that the pleadings will be in French, the oral arguments will be in French, the minutes of the court will be in French, the reports of the court will be in French, and that French decisions, French precedents, French procedure and French treatises will be heavily drawn upon.

France saved not only its territorial integrity and its political independence, but also its intellectual supremacy and the predominance of its language, at the Marne.

### Article 38

> A state desiring to have recourse to the court shall lodge a written application addressed to the registrar.
>
> The application shall indicate the subject of the dispute, and name the contesting parties.
>
> The registrar shall forthwith communicate the application to all concerned.
>
> He shall also notify the members of the League of Nations through the Secretary General.

Having determined the language, which is as a preliminary article or preamble to the section on procedure, the project next takes up the orderly course of a suit, from its presentation to its final judgment.

The court does not assume jurisdiction. An application is to be addressed to the registrar. It need not be a voluminous document; its purpose is only to indicate the subject of the dispute and the parties to it.

The registrar, or the clerk of the court, as we would say in American English, is to notify forthwith the interested parties. This will probably be done by transmitting a copy of the application itself. It would not only be the easiest method; it would also avoid the danger of error incident to a summary.

Should it be likewise given to the press? This proposition was

made, discussed and rejected in the informal sessions on procedure on the ground that an application from one litigant is bound to be an *ex parte* statement: that its publication by the court might seem to prejudice public opinion in favor of the plaintiff and against the defendant before the latter's case was presented or even prepared. One story is proverbially good until the other is told. It was decided, however, that the members of the League of Nations should be informed of the application. This will probably be done by transmitting a copy of the application to each.

In addition to informing them, it will give any of them an opportunity to intervene in the case, if the interests of third parties should seem to be involved.

ARTICLE 39

> If the dispute arises out of an act which has already taken place or which is imminent, the court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party.
>
> Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

It may well be that the rights of the parties are likely to be affected unless action be taken in their behalf. The question therefore arises, whether it is possible to invest the court with the power to assume control of the subject-matter and to take or suggest measures necessary for its protection pending the trial and disposition of the case. In other words, is it practicable to allow the court to issue a temporary injunction?

The treaties for the advancement of peace, negotiated by Secretary of State Bryan, furnish the answer in the form of a precedent, or really in the form of three precedents, as there are three treaties concluded by him on behalf of the United States, one with China and one with France, signed September 15, 1914, and one with Sweden, signed October 13, 1914. The fourth article of each provides that:

> In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission [of Inquiry] shall as soon as possible indicate what measures to preserve the rights of each party ought in its opinion to be taken provisionally and pending the delivery of its report.[2]

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[2] *Treaties for the Advancement of Peace between the United States and Other Powers Negotiated by the Honorable William J. Bryan, Secretary of State of the United States* (Carnegie Endowment for International Peace, 1920), pp. 17, 37, 95.

The Committee transferred this provision bodily from the treaties for the advancement of peace to its project for the advancement of justice. And rightly, for peace is the perfected work of justice.

This is a modest beginning to what may prove to be a very useful remedy. It is at present an indication, a suggestion, and the duty of the court stops with notice to the parties and to the Council.

### Article 40

The parties shall be represented by agents.
They may have counsel or advocates to plead before the court.

States do not act by themselves; they have representatives. Before the court these representatives are termed agents. The function of the agent is, as stated by Article 37 of the Pacific Settlement Convention of 1899, "to act as intermediaries between themselves and the tribunal." The agent may be instructed or permitted by his government to prepare the case, to present it and to argue it before the court. In practice, counsel or advocates are appointed to aid the agent in the performance of his various duties. There is a tendency to have the agent prepare and conduct the case, and to have it presented and argued by counsel or advocates. The agent is the political representative of his country; counsel and advocates are legal luminaries. A separation of functions seems likely to take place if the court is established, succeeds and is full to overflowing with business.

### Article 41

The procedure shall consist of two parts: written and oral.

In practice, procedure is divided into two phases which the present project terms "written and oral." Article 39 of the Pacific Settlement Convention of 1899 calls these "pleadings and oral discussions."

The report of 1899 on the convention states that it is desirable to distinguish them, that "the first is always indispensable," and that "the second is ordinarily a necessary complement of the first." The distinction is indeed important. The first phase can be completed without the coöperation of the court and indeed before it is convened. The second phase consists of the trial of the case in the court before the judges upon the issue or issues made by the written pleadings. It is the hearing of the case, as English and American lawyers would say.

### Article 42

The written proceedings shall consist of the communication to the judges and to the parties of statements of cases, counter-

cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the registrar, in the order and within the time fixed by the court.

A certified copy of every document produced by one party shall be communicated to the other party.

The written pleadings ordinarily consist of the case submitted to the court by the plaintiff and the counter-case submitted by the defendant. These are prepared by the agents of the parties plaintiff and defendant, usually assisted by counsel. They are transmitted to the clerk of the court, and by that official to the judges. They are prepared by each without the knowledge of the other party. The agents of the parties may desire, after reading the case made out by the other, to present a reply. This may be done. The various pleadings should contain the proofs and documents upon which the parties rely and a certified copy of every document produced by one party should be communicated to the other.

Article 42 of the project so provides, in accordance with the procedure of Articles 39 and 40 of the Pacific Settlement Convention of 1899, and Articles 63 and 64 of the Convention as revised in 1907.

### Article 43

The oral proceedings shall consist of the hearing by the court of witnesses, experts, agents, counsel and advocates.

For the service of all notices upon persons other than the agents, counsel and advocates, the court shall apply direct to the government of the state upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

So much for the written pleadings. The court needs now to be in session for the hearing of the case.

Witnesses and experts may be called, agents, counsel and advocates may be heard. Under the summary procedure devised by the Second Hague Conference, witnesses and experts could be called and the tribunal might request explanations from the agents as well as from experts and witnesses which the tribunal might care to summon and to hear. There was to be no oral argument.[3]

Witnesses and experts which the court may wish to summon and to hear will need to be notified to appear, and evidence may be needed

[3] Pacific Settlement Convention, Article 90.

which can only be had beyond the seat of the court. How is the notice in each case to be served? There is no difficulty in the case of agents, counsel and advocates, as this can be done by the clerk of the court. If the witnesses and experts reside within Holland, and the evidence can likewise be procured in that country, the court can apply to the Government of Holland, requesting it to serve the notices. In like manner, the court should apply to the government of the foreign state upon whose territory the notice is to be served.

The provisions for the service of notice are practically identical with Article 25, paragraph 1, of the Draft Convention for the Court of Arbitral Justice, and Article 27, paragraph 1, of the Prize Court Convention.

ARTICLE 44

> The proceedings shall be under the direction of the president, or in his absence, of the vice president; if both are absent, the senior judge shall preside.

For the orderly conduct of business, it is necessary that the proceedings should be directed by a competent person. This is universally the duty of the president. In courts which have a vice president, this official would naturally act in the absence of the president; in the absence of both, the senior judge. Article 44 so provides, in the language of Article 26 of the Draft Convention of the Court of Arbitral Justice, and of Article 38 of the Prize Court Convention of 1907.

ARTICLE 45

> The hearing in court shall be public, unless the court, at the written request of one of the parties, accompanied by a statement of his reasons, shall otherwise decide.

Shall the court hear the case in public? Shall it have the power to decide to hear the case behind closed doors upon its own motion, at the request of both of the parties, or at the request of only one of them? Article 45 lays down the general rule that the case shall be heard in public. It allows the court, however, upon the request of one of the parties, to decide otherwise.

It was proposed in the informal meetings of the committee to consider procedure, that the court should sit in public and that this rule should not be varied. It was also proposed that it should sit in public except at the request of both parties. It was finally agreed to allow the court, at the request of one party, to decide that it should sit behind closed doors, provided that the request be accompanied by a statement

of the reasons which in the opinion of the party making the request would justify it. Publicity is thus the rule, privacy the exception; and the exception must be justified by reasons which the court approves. It is therefore safe to predict that publicity will not suffer by the application of the rule permitting privacy of proceedings under what will inevitably be very special circumstances.

### Article 46

> Minutes shall be made at each hearing and signed by the registrar and the president.
>
> These minutes shall be the only authentic record.

The court should have a record of its proceedings. This record should be official. It should therefore be prepared in the clerk's office. It should be signed by the registrar, to indicate that it was prepared in his office, and to guarantee its accuracy. It should be signed by the president, on behalf of the court, to identify it as the authentic record of its proceedings. This document, thus prepared, is by Article 46 declared to be the only authentic record in the premises.

These provisions, reasonable in themselves and carrying conviction without authority, are based upon Article 21 of the Pacific Settlement Convention of 1899, Article 66 of the revision of 1907, and reproduced from Article 39, paragraph 2, of the Prize Court Convention.

### Article 47

> The court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

The convention constituting the court can only be expected to lay down the main lines of procedure. It can not and should not attempt to provide against every emergency. Cases differ and the procedure must be modified to meet changing and changed conditions. The court must have this power, otherwise injustice may be inadvertently done. The power, however, should be specifically conferred. This is done by Article 47, which makes the court master of the case, permitting it to issue rules for its conduct, to decide the forms, the times within which the parties shall conclude their argument, and to make the necessary arrangements for the taking of evidence. These provisions were devised by the First Hague Conference and are contained in Article 49 of the Pacific Settlement Convention. They justified themselves, and were carried over into the revision of that convention made by the Second

Hague Conference. They are identical in substance and almost identical in form, therefore, with Article 74 of the revised convention.

### Article 48

> The court may, even before the hearing begins, call upon the agents to produce any document, or to supply to the court any explanations. Any refusal shall be recorded.

Familiar in advance with the procedure to be followed and the means of getting the case, with the proofs to support their contentions, before the court, the judges may have the impression that one or other agent is withholding evidence which, if produced, would be of service to the court in enabling it to reach a just judgment. The natural desire of the agent is to win the case, not to enable the opposite party to triumph. The evidence may therefore be presented in a fragmentary way, to the satisfaction of the agent or agents of both parties, in so far as their respective contentions are concerned, but to the dissatisfaction of the court, whose sole purpose is justice, not success. Hence, it is essential that the court before or during the trial of the case be empowered to call for the production of documents which it may deem material, and of its own motion to request arguments on points which are doubtful or not sufficiently treated by agent or counsel. As the court deals with sovereign states, it cannot force the production of evidence which one party or the other may be unwilling to present. It can, however, and it should note a refusal to comply with its request. This Article 48 permits and requires.

These provisions are not new. They are contained in substance and almost in identical language in Article 44 of the Pacific Settlement Convention of 1899 and Article 69 of the revised convention of 1907. They have been tried and they have not been found wanting.

### Article 49

> The court may, at any time, entrust any individual, bureau, commission or other body that it may select, with the task of carrying out an inquiry or giving an expert opinion.

It may, however, happen that the evidence desired by the court is not contained in a document which can be produced by either of the litigating parties. It may require an investigation. Therefore, the court, in the interest of justice, is authorized by Article 49 to cause an investigation to be made, to obtain an expert opinion, and to choose the ways and means best calculated in its opinion to produce the desired result.

These provisions are, it is believed, the logical consequence of the power with which the court is vested to have at its disposal the evidence needed for the determination of the case and to do justice between the parties.

ARTICLE 50

> During the hearing in court, the judges may put any questions, considered by them to be necessary, to the witnesses, agents, experts, advocates or counsel. The agents, advocates and counsel shall have the right to ask, through the president, any questions that the court considers useful.

Inasmuch as the witnesses and experts, agents, advocates and counsel are for the enlightenment of the court, it would seem to follow, and without a provision to that effect, that the court should put any and all questions to them which the members of the court may consider necessary or advisable in the interest of justice.

Article 50 recognizes, rather than accords this right, inasmuch as it reproduces in substance the first paragraph of Article 47 of the Pacific Settlement Convention of 1899 and Article 72 of the revision of that convention in 1907. Each of these articles contains in its second paragraph the statement that neither the questions nor the remarks of the judges are to be taken as an expression of opinion on their part. This provision has been omitted as unnecessary.

It will be observed that the judges put questions which they may deem necessary, whereas it is the rule in English and American courts of justice for counsel themselves to put all questions which they consider necessary and which the court considers relevant. In other systems of procedure, counsel do not have this right. In the informal sessions of the committee, the opinion was freely expressed that the president of the court might refuse to put questions which counsel deemed important and indeed essential. It was therefore provided, in case the president refused to comply with the request of the agents, advocates and counsel entrusted with the trial of the case, that an appeal could be taken to the court, which would decide whether the questions should or should not be put. It is believed that this is a happy compromise between the two systems of procedure.

ARTICLE 51

> After the court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other agrees.

These various provisions are designed to supply the court with all the information needed, so that its members may decide in the fullness of knowledge. There must be an end to litigation, and agent and counsel must present their evidence within the time fixed or to be fixed by the court. But here, again, the rule must not be too rigid, for justice is to be done. One of the parties should not be permitted to embarrass the court and to prolong the proceedings. Nevertheless, if evidence has come to light which in the opinion of both of the parties, not merely one of them, is essential to the trial and disposition of the case, it should be the duty of the court to receive it. This provision of Article 51 reproduces the substance with only a slight change of language of Article 42 of the Pacific Settlement Convention of 1899 and Article 67 of the revision of 1907.

But more than this may be needed for justice's sake. The court should be authorized in its discretion to receive further evidence at the request of one party and over the opposition of the other. A judgment must not only be just, it must seem just.

### Article 52

> Whenever one of the parties shall not appear before the court, or shall fail to defend his case, the other party may call upon the court to decide in favor of his claim.
>
> The court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 33 and 34, but also that the claim is supported by substantial evidence and well founded in fact and law.

The project and the rules of procedure contemplate the presence of both parties in litigation before the court. This is essential in arbitration. It is not so, but it is ordinarily the case in courts of justice. If the contention of the Japanese member should prevail, that the court can only exercise the jurisdiction conferred upon it by Article 34 with the express consent of both parties to the litigation, both of the parties will be before the court, which can only exercise its jurisdiction in their presence. It would therefore be unnecessary to provide for procedure in the absence of one or the other of the parties. The remaining members of the Committee were of the opinion that justice should not be obliged to wait upon a party which was unwilling to have its conduct tested by the rules of law applicable to the dispute. In their opinion, the project should contain a provision to the effect that, within the jurisdiction of the court defined by Article 34, the plaintiff should have the right to present its case to the court, with the evidence necessary

to support it, and to proceed in the absence of the defendant, properly notified of the suit and invited or summoned to appear before the court. They felt that the right should be carefully safeguarded so as not to prejudice the interest of the defendant, and they believed that the requirement to exhaust diplomatic means before resorting to the court in any event would prevent an abuse of the right.

The essential condition for the exercise of jurisdiction in such a case is and must be, that the plaintiff, although proceeding *ex parte,* should present its case as fully as if the defendant were present, and that the court be especially mindful of the interests of the absent defendant. This does not mean that the court shall take sides. It does mean, however, that the court, without espousing the cause of the defendant, shall, nevertheless, act as its counsel. There is an apt French phrase to the effect that "the absent are always wrong." The court must go on the assumption that the absent party is right, not wrong until the plaintiff has proven him to be wrong. There is no alternative except to refuse jurisdiction, if the defendant does not appear, or to compel the presence of the defendant. The world is not ripe for this. The precedent of the Supreme Court of the United States is to the effect that it is not necessary in the interest of justice that the defendant state be present, provided the plaintiff be held to strict accountability. This very question was considered on two occasions by Chief Justice Marshall in the fullness of his powers, after thirty years of experience on the bench as Chief Justice of the Supreme Court of the United States. In the suit over boundaries of the *State of New Jersey* v. *State of New York,* counsel not appearing for the state of New York, the Chief Justice allowed summons to be issued against that state to procure its appearance. The summons was issued, but the state of New York did not appear, and the question then arose whether the plaintiff could proceed in the absence of the defendant. Upon this question Chief Justice Marshall, speaking for the court, said:

> It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution and existing acts of congress. The rule respecting the process, the persons on whom it is to be served, and the time of service are fixed. The course of the court on the failure of the state to appear, after the due service of process, has been also prescribed.
>
> In this case the subpoena has been served as is required by the rule. The complainant according to the practice of the court, and according to the general order made in the case of Grayson *vs.* The Commonwealth of Virginia [3 Dallas, 320, decided in 1796], has a right to proceed ex

parte; and the court will make an order to that effect, that the cause may be prepared for a final hearing. If upon being served with a copy of such order, the defendant shall still fail to appear or to show cause to the contrary, this court will, as soon thereafter as the cause shall be prepared by the complainant, proceed to a final hearing and decision thereof.[4]

This decision was confirmed a few years later in the leading case of *Massachusetts* v. *Rhode Island,* in which Mr. Justice Thompson expressed the opinion "that the practice seems to be well settled, that in suits against a state, if the state shall refuse or neglect to appear, upon due service of process, no coercive measures will be taken to compel appearance; but the complainant, or plaintiff, will be allowed to proceed ex parte." [5] There is, therefore, no lack of precedent for the Permanent Court of International Justice.

Article 52 of the project according this right to the plaintiff state contemplates, as is the practice of the Supreme Court of the United States, that the plaintiff shall prepare the case for final hearing. Judgment is not to be entered upon the pleadings of the plaintiff; counsel can not rest with folded arms and ask that a judgment be entered in accordance with their contentions. The plaintiff must proceed, albeit *ex parte,* and the court enters judgment in accordance with the plaintiff's contentions if, and only if, and to the extent that it finds them to be founded in fact as well as in law.

In the event that this method of procedure be accepted by the League of Nations, its application will be rare, inasmuch as there is every inducement for a state to be present, if it knows that judgment may be had against it and in its absence. Such action would be in accordance with the conduct of Massachusetts. Counsel for that state gained his point to the effect that the appearance of the defendant, Massachusetts, would not be coerced, but inasmuch as the plaintiff, Rhode Island, was at liberty to proceed *ex parte* in the absence of the defendant, Massachusetts appeared, defended the case, and in the final decision, triumphed.

### Article 53

> When the agents, advocates and counsel, subject to the control of the court, have presented all the evidence, and taken all other steps that they consider advisable, the president shall declare the case closed.

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[4] 3 Peters, 461, decided in 1830, and 5 Peters, 284, 290-291, decided in 1831.

[5] *State of Massachusetts* v. *State of Rhode Island* (12 Peters, 755, 761), decided in 1838.

The court shall withdraw to consider the judgment.

The deliberations of the court shall take place in private and remain secret.

In the presence of both parties, as well as in the absence of the defendant, the proceedings are under the court's supervision, and it is only when all evidence has been taken and the case is ready for decision, that the president will declare the proceedings at an end.

Comment upon this article seems unnecessary, unless it be to state that the phraseology was taken from Articles 50 and 53 of the Pacific Settlement Convention of 1899, Articles 77 and 78 of the revision of 1907.

The case is then in the hands of the court. Its members withdraw to confer in private and their deliberations are and remain secret. These further provisions of Article 53 are lifted bodily from Article 78 of the Pacific Settlement Convention as revised in 1907, and from Article 27 of the Draft Convention of the Court of Arbitral Justice.

### Article 54

All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the president or his deputy shall have a casting vote.

Are the decisions to be unanimous? It is to be hoped that they will, but it would be too much to require that they must be. The Pacific Settlement Convention, in its original form (Article 51) and its revised form (Article 78), contented itself with a majority. Article 54 of the present project likewise accepts a majority, borrowing the form and substance of its provisions on this point from Article 27 of the Draft Convention for the Court of Arbitral Justice.

The court may, however, consist of an even number of judges, and the judges may be evenly divided. What is to be done? Article 27 of the Draft Convention for the Court of Arbitral Justice provided that in such a case the vote of the junior judge should not be counted. But it might happen that this judge was the temporary member of the court appointed by one or other of the parties in litigation, and in such an event there would be an inequality at the moment of decision—the very time of all others when parties litigant should be on a footing of equality.

After discussion, it was decided that the opinion of the president should, in such cases, prevail. The president himself may be a citizen or subject of one of the parties. What then? This contingency was

either overlooked by the Committee, or the care with which the president is chosen seemed a guarantee that justice would not suffer even in such a case. Experience will show.

### Article 55

> The judgment shall state the reasons on which it is based. It shall contain the names of the judges who have taken part in the decision.

The judgment of the court, in the technical sense of the term, is restricted to the decision on the very point submitted to the court for its determination. From this standpoint the statement would be sufficient that the court decides in favor of the plaintiff or defendant. This would perhaps satisfy the successful party, but it would not satisfy the loser, and it would clearly not satisfy public opinion.

The reasons upon which the judgment is based should be stated and the judgment should contain the names of the judges taking part in the decision. Such are the requirements of Article 55, reproducing the like provisions of Article 28 of the Draft Convention of the Court of Arbitral Justice. Without requiring a statement of the reasons leading to the judgment, it is difficult to see how international law can be made, as it should, and assuredly will be made by the successful operation of the International Court of Justice.

### Article 56

> If the judgment given does not represent, wholly or in part, the unanimous opinion of the judges, the dissenting judges shall be entitled to have the fact of their dissent or reservations mentioned. But the reasons for their dissent or reservations shall not be expressed in the judgment.

The question arises whether the reasons of the dissenting judges shall be given. As to this, there is much difference of opinion, and practice varies in different countries and in different courts of justice. The Committee chose the mean between the extreme positions which would, on the one hand, require dissenting opinions to be given, and, on the other hand, forbid the expression of dissent.

Therefore, according to Article 56 of the project, the dissenting judges have the right, if they care to exercise it, to a statement of their dissent, or of their reservations to the whole or a part of the judgment in which they have participated. They must, however, content themselves with a statement of their dissent or reservations, without advancing reasons or arguments in their behalf. In this way, the parties in

litigation are in a position to know what part of the judgment, if any, was unanimous, and what part was not, and public opinion will be able to test the reasons upon which the opinion of the majority is supported by the dissent or reservations of the minority.

ARTICLE 57

> The judgment shall be signed by the president and by the registrar. It shall be read in open court, due notice having been given to the agents.

The judgment, whether unanimous or reached by a majority of the judges, must be the judgment of the court, and that there may be no doubt as to its authenticity, the president and the registrar sign it. The act of each is purely administrative, as the registrar has taken no part in the proceedings and the president may be opposed to the decision.

This requirement is taken from Article 28 of the Draft Convention for the Court of Arbitral Justice. The judgment, as is usual, is to be read in open court, in the presence of the agents if they care to be present; in their absence, if duly notified to be present.

No authority seems necessary for such provisions, but it is, however, to be found in Article 53 of the Pacific Settlement Convention, Article 80 of the revision thereof of 1907, and Article 45 of the Prize Court Convention.

ARTICLE 58

> The judgment is final and without appeal. In the event of uncertainty as to the meaning or scope of the judgment, the court shall construe it upon the request of any party.

What is the effect of the judgment? The Permanent Court of International Justice may, indeed, be a court of first instance, but it has no court above to which an appeal can be made. Its decision, therefore, is meant to be final and Article 58 so declares.

The judgment, however, may be ambiguous or may seem so, especially to the loser. Doubt or uncertainty should not be permitted to exist. The judgment may be wrong, as even judges err betimes, but its meaning must be clear, certain and unmistakable. Therefore, to this end, Article 58 further provides that the court may be called upon to interpret its judgment at the request of any one of the litigating parties. In so doing, the Committee had in mind Article 82 of the Pacific Settlement Convention of 1907, which provides that, "Any dispute arising between the parties as to the interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the tribunal which pronounced it."

ARTICLE 59

An application for revision of a judgment can be made only when it is based upon the discovery of some new fact, of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings in revision will be opened by a judgment of the court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

No application for revision may be made after the lapse of five years from the date of the sentence.

It must, however, not be forgotten that the purpose of the court is to do justice. And in the words attributed to a great President of the United States, whose day has not yet passed, "Nothing is settled until it is settled right." This remark of President Lincoln, aptly quoted by Mr. Holls in the First Hague Conference, when the question of revision of an arbitral award was under discussion, overcame opposition and likewise bore fruit on the present occasion, inasmuch as Article 55 of the Hague Convention of 1899 embodied in Article 83 of the revised convention of 1907, forms the substance of Article 59 of the present project, with certain modifications of form and additions of substance to fit it to a changed environment.

The original article of the Pacific Settlement Convention permitted a revision, unless there was an agreement to the contrary, when a new fact was discovered which might have had a decisive influence on the decision if it had been known to the court and to the party claiming revision before the decision was rendered. Article 59 adds that ignorance of the fact was not due to negligence of the party.

The original article of the Pacific Settlement Convention stated that the *compromis,* or special agreement, submitting the case to arbitration, should fix the period within which the demand for revision should be made. Inasmuch as the Court of Justice proceeds without a special agreement or *compromis,* the project fixes the date within five years of rendering judgment.

The Advisory Committee wisely permitted the court to require, as a condition precedent to revision, compliance with the terms of the judgment. The judgment therefore speaks from its delivery, even though it be subject to revision.

ARTICLE 60

> Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the court to be permitted to intervene as a third party.
>
> It will be for the court to decide upon this request.

So far, the project has confined its attention to the original parties to the controversy, or to the parties which have laid their case before the court, or to the case as presented by the plaintiff if the defendant does not appear and contest the case. The Committee, however, foresaw that third parties might be interested either at the beginning or in a subsequent phase of the case. Therefore, Article 38 requires the registrar not only to notify the parties mentioned in the application, against which suit was begun, but also to notify the members of the League of Nations, through its Secretary General. Article 60 provides that a party claiming a legal interest in the cause can request the court to permit it to intervene. Undoubtedly the permission will be granted, provided the request set forth an interest of a legal nature, inasmuch as the court is a judicial, not a political body.

Whether the state desiring to intervene has an interest, and whether the interest be of a legal nature, may often give rise to a difference of opinion. The question must be decided, and under Article 60, it is to be decided by the court. Inasmuch, however, as only parties to the judgment are bound by it, and only those are parties who are parties to the record, it is very desirable that all states claiming interest should be before the court, so that its decision affecting all parties in interest should bind all. *Interest reipublicae ut sit finis litium.*

ARTICLE 61

> Whenever the construction of a convention, in which states other than those concerned in the case are parties, is in question, the registrar shall notify all such states forthwith.
>
> Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be as binding upon it as upon the original parties to the dispute.

There is a special case in which many nations may be interested, and in which each has a right to intervene without requiring the permission of the court. This is the case which the distinguished Dutch jurist, Mr. Asser, laid before the First Hague Conference, by which it was considered and incorporated in Article 56 of the Pacific Settlement

Convention. It was likewise discussed at the Second Hague Conference and Article 56 was adopted with trifling changes as Article 84 of the revised convention. This article, which follows in full, is, as will be observed, the basis—indeed, more than the basis—of Article 61 of the project:

> The award is not binding except on the parties *in dispute*.
> When it concerns the interpretation of a convention to which Powers other than those in dispute are parties, they *shall inform all the signatory Powers in good time*. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

The means is thus provided by virtue whereof any party to what is sometimes called a multilateral convention can take part in a dispute concerning its meaning, and in which it was not originally involved, in order to present its views to the court and eventually to make them prevail.

If a third party does not avail itself of the right to intervene, although notified in due time of the cause of action, it certainly prejudices its case, if it be minded in the future to appeal to the court in a case arising out of this convention. It is, to be sure, not legally bound, but in the forum of morals it could undoubtedly be taxed with negligence and accused with good reason of sleeping upon its rights

### Article 62

> Unless otherwise decided by the court, each party shall bear its own costs.

Who is to pay the costs of the suit before the Permanent Court of International Justice? The expenses of the court as such, are to be borne by the League of Nations, according to Article 30 of the project. But expenses of the parties are not expenses of the court, and it would seem that each party should bear its own expenses.

There may be cases in which this rule, fair upon its face, would be inequitable in practice. The Committee was of this opinion, and while adopting the general rule that each party should pay its own costs, nevertheless, allowed, by Article 62 of the project, the court to decide otherwise, in its discretion and according to its sense of justice.

### Execution of the Judgment of the Court

It might be expected that the section of the project dealing with procedure would end with an article on execution. There is, however,

none. This does not mean that the Advisory Committee overlooked the matter. It was considered in the informal sessions devoted to procedure. After discussion, the opinion was expressed in favor and against an article on the subject, but in the end the view prevailed that it was the duty of the court to find the facts involved in a concrete case before it and to apply the appropriate rules of law to the facts as found. Execution, as the name implies, belongs to the executive and should be left where it belongs in the domain of politics and of expediency.

The Committee tentatively adopted an article to the effect that the parties should promptly notify the Secretary General or the court of the execution of the judgment or the steps taken to its execution. On reflection, the Drafting Committee recommended that this highly proper but imperfect article should be omitted. The Advisory Committee was also and unanimously of the same opinion.

## RESOLUTIONS OF THE ADVISORY COMMITTEE

### I.—An International Conference in Continuation of the First and Second Hague Conferences to Meet at Stated Intervals for the Advancement of International Law.

The Advisory Committee of Jurists, assembled at The Hague to draft a plan for a Permanent Court of International Justice,

Convinced that the security of States and the well-being of peoples urgently require the extension of the empire of law and the development of all international agencies for the administration of justice, recommends:

I. That a new conference of the nations in continuation of the first two conferences at The Hague be held as soon as practicable for the following purposes:

1. To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war.
2. To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.
3. To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore.

4. To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

II. That the Institute of International Law, the American Institute of International Law, the *Union Juridique Internationale,* the International Law Association, and the Iberian Institute of Comparative Law be invited to prepare with such conference or collaboration inter sese as they may deem useful, projects for the work of the Conference to be submitted beforehand to the several Governments and laid before the Conference for its consideration and such action as it may find suitable.

III. That the Conference be named Conference for the Advancement of International Law.

IV. That this Conference be followed by further successive conferences at stated intervals to continue the work left unfinished.

The First Hague Conference, in which twenty-six Powers were represented, was proposed by the Czar of Russia in 1898. It was invited by the Netherland Government and met at The Hague on the 18th day of May, 1899. It adjourned on July 29, 1899, having to its credit conventions: (1) for the pacific settlement of international disputes, (2) regarding the laws and customs of war on land, (3) for the adaptation to maritime warfare of the principles of the Geneva Convention; and three declarations prohibiting (1) the launching of projectiles and explosives from balloons, (2) the diffusion of asphyxiating gases, and (3) the use of dum dum bullets. The conference also adopted a resolution expressing the opinion that the restriction of military charges is extremely desirable, and it formulated *vœux:* (1) for the revision of the Geneva Convention, (2) that the questions of the rights and duties of neutrals may be inserted in the program of a conference in the near future, (3) that questions with regard to rifles and naval guns may be studied by the governments with the object of coming to an agreement respecting the employment of new types and calibers, (4) that the governments examine the possibility of an agreement as to the limitation of armaments and war budgets, and that the proposals for (5) the inviolability of private property in naval warfare and (6) for the settlement of the question of the bombardment of ports, towns and villages by a naval force, may be referred to a subsequent conference for consideration.

If it be true, as Dr. Johnson has said, that "War and peace divide the business of the world," the Hague Conference showed itself disposed to take up and to consider this business. Its success in handling the problems arising out of this business convinced its members and the

public at large that the Hague Conference could be trusted to do the world's business, in so far as this could be done by an international gathering. It was believed that this conference would be the first of many, and its distinguished president, Baron Staal, first delegate of Russia, thought that another conference would meet in the year ensuing after its adjournment. Time slipped away without a call for a new conference, and Russia found itself involved in a war with Japan. President Roosevelt sounded the nations in 1904 as to their willingness again to meet in conference at The Hague. They were willing. The war between Russia and Japan ended in 1905. Russia asked the Netherlands to convoke the conference which Mr. Roosevelt had proposed. It met at The Hague, June 15, 1907, with representatives of forty-four states and adjourned October 18, 1907, having to its credit revisions of the conventions: (1) for the pacific settlement of international disputes, (2) respecting the laws and customs of war on land, (3) for the adaptation to naval war of the principles of the Geneva Convention, and (4) of the declaration prohibiting the discharge of projectiles and explosives from balloons. In addition the conference adopted new conventions: (1) respecting the limitation of the employment of force for the recovery of contract debts, (2) relative to the opening of hostilities, (3) respecting the rights and duties of neutral Powers and persons in case of war on land, (4) relative to the status of enemy merchant ships at the outbreak of hostilities, (5) relative to the conversion of merchant ships into war-ships, (6) relative to the laying of automatic submarine contact mines, (7) respecting bombardment by naval forces in time of war, (8) relative to certain restrictions upon the right of capture in naval war, (9) relative to the creation of an International Prize Court, and (10) concerning the rights and duties of neutral Powers in naval war. A declaration admitting the principle of compulsory arbitration, and declaring that certain disputes, particularly those relating to the interpretation and application of international agreements, may be submitted to compulsory arbitration without any restriction was unanimously adopted. The resolution of 1899 in regard to the limitation of military expenditure was unanimously readopted, and the following *vœux* expressed the wish: (1) that the signatory Powers adopt the annexed draft convention for the creation of a Court of Arbitral Justice and the bringing it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the court; (2) that in case of war, the responsible authorities ensure and safeguard the maintenance of pacific relations between the inhabitants of the belligerent states and neutral countries, (3) that the position of

foreigners as regards military charges should be regulated by special treaties, and (4) that the preparation of regulations relative to the laws and customs of naval war should figure in the program of the next conference.

The final recommendation of the Second Hague Conference is so pertinent to the Resolution of the Advisory Committee now under consideration that it deserves quotation in full. It reads as follows:

Finally, the Conference recommends to the Powers the assembly of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding Conference, at a date to be fixed by the common agreement between the Powers, and it calls their attention to the necessity of preparing the program of this Third Conference a sufficient time in advance to ensure its deliberations being conducted with the necessary authority and expedition.

In order to attain this object the Conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory committee should be charged by the governments with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a program which the governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This committee should further be intrusted with the task of proposing a system of organization and procedure for the Conference itself.

In pursuance of the *vœu* that a Third Conference at The Hague should assemble approximately in the year 1915, various nations had appointed committees to prepare for that Conference, its organization, its procedure, its program. But these preparations were abruptly halted by the outbreak of the World War in 1914. The victory of the Allied and Associated Powers in November, 1918, made the world ready for peace, and the series of peace treaties concluded in 1919 paved the way for the meeting of the Advisory Committee of Jurists at The Hague in 1920.

Farsighted observers in the United States and elsewhere had previously advocated the resumption of the conferences at The Hague. The Executive Council of the American Society of International Law, upon the initiative of its President, Mr. Root, on April 17, 1919, unanimously

*Resolved*, That the Executive Council of the American Society of International Law urges upon the Conference at Paris the adoption of a provision by which there shall be called a general conference of the Powers to meet not less than two years nor more than five years after

the signing of this convention for the purpose of reviewing the condition of international law, and of agreeing upon and stating in authoritative form the principles and rules thereof; and that thereafter, regular conferences for that purpose shall be called and held at stated times.

This resolution was transmitted to the American Commission to the Paris Conference, but that body apparently did not urge it upon the conference. In any event, no action of the kind was taken. The Covenant of the League of Nations, adopted by the Paris Conference and forming, as it were, the preamble to the Treaty of Versailles, directed the Council of the League to prepare plans for the establishment of a permanent court of international justice. The Advisory Committee of Jurists requested by the Council to prepare plans for the establishment of this court met at The Hague, June 16, 1920, and adopted on July 22, a project for the establishment of a Permanent Court of International Justice. This court is to be a court of justice, to administer the rules of law agreed upon by nations, to supply this law, where it is lacking, and to enlarge the jurisdiction of the court, so that, little by little, it may be competent to accept and to decide all disputes of nations of a justiciable character, according to the principles of justice stated in rules of law, adopted by all the nations meeting regularly and at stated intervals in conference. The Committee of Jurists unanimously adopted this resolution drafted by Mr. Root, proposed jointly by him and Baron Descamps, recommending at the earliest practicable date a new conference of the nations, in continuation of the First and Second Conferences at The Hague, for the advancement of international law, to be followed at stated and frequent intervals by like conferences, in order to continue the work begun and left unfinished by their predecessors.

Mr. Root's original draft concluded with a statement justifying the call and stating in general terms the benefits which would inevitably accrue from the successful labors of successive conferences. This part of the resolution, which the Committee had already adopted, was omitted at the request of the Japanese member, who had on various occasions expressed himself as averse to the extension, at this time and under present conditions, of the field of obligatory arbitration or obligatory jurisdiction of a court of justice. This portion of the resolution was thus worded:

> Your Committee has reported a project for a Permanent Court with general jurisdiction for the decision of all justiciable questions between states submitted to it with the voluntary consent of parties, and with obligatory jurisdiction limited to the decision of the questions described in the 13th article of the Covenant of the League of Nations as arising under treaties and under the accepted rules of international law.

It is believed that the operation of the conferences now recommended will be continually to extend the domain of international law and thus continually to enlarge the obligatory jurisdiction of the court without losing the definite limits necessary to guard against the arbitrary exercise of power.

And it is believed that these institutions for the application of law to the affairs of nations, together with the present permanent Court of Arbitration at The Hague retained for the disposal of questions properly subjects for arbitration as distinguished from strictly judicial action, will constitute a complete system for the effective and progressive observance of the rule of public right as the controlling force in the intercourse of nations.

It will be observed that the resolution of the Committee as voted invites various bodies of an international nature, such as the Institute of International Law, the American Institute of International Law, the *Union Juridique Internationale,* the International Law Association, and the Iberian Institute of Comparative Law, "to prepare with such conference or collaboration *inter sese* as they may deem useful, projects for the work of the Conference to be submitted beforehand to the several governments and laid before the conference for its consideration and such action as it may find suitable."

The experience that the world has had with the Conference at Paris, composed of nationally-minded instead of internationally-minded men, has suggested in more than one quarter the advantage of consulting members of scientific bodies, the acceptance of whose work depends solely upon its merit and practicability. Who is to decide? Not the members of these associations, but the governments. Therefore their projects are to be submitted to the governments, and laid before the conference, composed of representatives of the governments, for consideration and such action as it may find suitable. This will mobilize representative publicists of various nationalities. It will enable the nations to profit by their work if it is valuable, but will not bind them to accept it unless it meets with their approval. It can help, but it cannot hurt.

Who may call the conference? Any authority or power to which the world will listen. The Second International Peace Conference was, to quote the opening lines of its Final Act, "proposed in the first instance by the President of the United States of America."

## II.—A High Court of International Justice for the Trial of Offenses against Public Order and the Law of Nations

The Advisory Committee of Jurists, assembled at The Hague to draft a plan for a Permanent Court of International Justice,

Having considered a proposition laid before it by its president for the establishment in the future of a High Court of International Justice, conceived in these terms:

### Article 1

A High Court of International Justice is hereby established.

### Article 2

This court shall be composed of one member for each state, to be chosen by the group of delegates of each state represented in the court of arbitration.

### Article 3

The High Court of Justice shall be competent to try crimes against international public order and the universal law of nations, which shall be referred to it by the assembly or by the Council of the League of Nations.

### Article 4

The court shall have power to define the nature of the crime, to fix the penalty and to prescribe the appropriate means of carrying out the judgment. It shall formulate its own rules of procedure.

Recognizing the vast importance of this proposition,

Recommends the examination thereof to the Council and the Assembly of the League of Nations.

In laying before the Advisory Committee a proposal to establish, in the future and for the future, a high court of international justice to take cognizance of crimes against universal public order and against the universal law of nations, Baron Descamps stated that the failure of the Conference at Paris to create such a tribunal, due to the opposition of the American and Japanese representatives in the Commission on Responsibilities, prevented the punishment of Emperor William II for the invasion of Belgium and of the German officers for the crimes and violations of international law which they were alleged to have committed in the course of the World War. It is true that the attempt failed primarily because of the opposition of the American members, who felt themselves bound by a decision of the Supreme Court of the United States in the leading case of *United States* v. *Hudson* (7 Cranch 32, 34), decided in 1812, which held that to make an act a crime and

punishable as such, "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." In the dissenting opinion which they felt obliged to file with the records of the Commission on Responsibilities, the American members added, by way of comment upon this decision, "that what is true of the American states must be true of this looser union which we call the Society of Nations"; that they knew "of no international statute or convention making a violation of the laws and customs of war—not to speak of the laws or principles of humanity—an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence." [1]

It will be observed that Baron Descamps' High Court is to be constituted by the Society of Nations, that is to have jurisdiction of crimes against public international order and the law of nations, that the penalty for the crime is to be prescribed and the means of executing the judgment stated. Because of these provisions and because also of the fact that, if created, it would be applied to the future and would not have jurisdiction of any offense, real or alleged, committed before its institution, the Advisory Committee recommended the project to the consideration of the Council and the Assembly of the League of Nations.

## III.—The Installation of the Academy of International Law at the Hague Peace Palace

> The Advisory Committee of Jurists, assembled at The Hague to draft a plan for a Permanent Court of International Justice,
>
> Gladly avails itself of this opportunity to express the hope that the Academy of International Law, founded at The Hague in 1913, and whose operation has, owing to circumstances, been interrupted, shall, as soon as possible, enter upon its activity alongside of the Permanent Court of Arbitration and the Permanent Court of International Justice, in the Peace Palace at The Hague.

In his address at the Second Hague Peace Conference, of which he was president, and in the third of its plenary sessions held on July 20, 1907, Mr. Nelidow said:

Before closing I wish to mention a certain communication, or rather an interesting suggestion which has reached me. Mr. Richard Fleischer, editor of the *Deutsche Revue,* sent me a number of his journal, in which

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[1] *Violation of the Laws and Customs of War. Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919* (Pamphlet No. 32, Division of International Law, Carnegie Endowment for International Peace), p. 75.

Professor Otfried Nippold, of Berne, recommends to the Conference the creation at The Hague, near the tribunal of arbitration, of a central school of international law, which would aid in spreading judicious notions on that subject, and in teaching them to those who would later be called upon for their application.

This would be, I imagine, a course of law at an academy which would study and preserve its principles continually changed by the usage given them by the operation of the supreme tribunal of arbitration; something like the Asclepicion founded by Hippocrates on the Island of Cos for medical science.

I considered it my duty to refer to this interesting suggestion, because in my opinion it is pertinent and, were the idea carried out, capable of rendering great aid to the cause which we all serve. Perhaps the mention made of it here, which I trust meets the approval of the Conference, will inspire some generous benefactor with the idea of following the example of Mr. Andrew Carnegie.

These remarks of the eminent Russian diplomatist did not fall upon deaf ears. The Endowment for International Peace, founded by Mr. Andrew Carnegie, took up the project, and with the coöperation of the Institute of International Law and with the approval and encouragement of the Dutch Government, founded the Academy for the very purposes so admirably stated by Mr. Nelidow, to be installed in the Peace Palace, which the munificence of Mr. Carnegie had meantime established at The Hague, and of which the cornerstone was laid during the sessions of that very conference.

The Academy of International Law and Political Sciences, whose sessions were to be held in the summer under the direction of competent instructors of different nationalities and attended by students from various parts of the world, was founded on the eve of the World War, and was to have held its opening session in the fatal month of August, 1914.

Useful before, it can be more useful after this war, when the thoughts of nations are turned to peace and its preservation as never before within the memory of man now living. The path of peace is the path of justice, and the world may look forward to a happier future with the periodic meetings of Conferences at The Hague for the Advancement of International Law, with the Permanent Court of Arbitration installed at the Peace Palace at The Hague for the settlement of political claims which have baffled the foreign offices of nations, with a Permanent Court of International Justice for the passionless administration of rules of law to be established in the Peace Palace, and with the opening of an Academy of International Law and Political Sciences in which the labors alike of Conference, of Court of Arbitration, and

of Court of Justice, will be appreciated, justice expounded, rules of law defined, and the relations of nations in a regulated world be made known.

## CLOSING SESSION OF THE ADVISORY COMMITTEE OF JURISTS, JULY 24, 1920

The articles of the project were read and approved one by one, and the project as a whole was adopted unanimously on July 22nd. The Committee adjourned until Friday morning, the 23rd, in order to allow the reporter, Mr. de Lapradelle, the eminent professor of international law of the University of Paris, and a master of spoken and written French, to add the finishing touches to his report and to put it in accord with the final form of the project and its provisions. His report was presented the morning of the 23rd and was read by him page by page to the members of the Committee, who made sundry modifications. The reading was continued in the afternoon and was finished the morning of July 24th. Upon motion of Mr. Root the report as presented and amended was unanimously adopted.

Mr. Ricci-Busatti thereupon asked how the result of the Committee's labors was to be presented to the Council. He said that the choice lay between the President and the Secretariat and he asked whether it would not be advisable for the President to attend the forthcoming meeting of the Council at San Sebastian. Lord Phillimore was of the opinion that the Secretariat ought to act "as go-between." Mr. Root, however, was of the contrary opinion and made the following threefold proposal:

1. That it is clear from the terms of the invitation sent to members of the Committee, that the Committee must communicate the result of its labors to the Secretariat of the League of Nations;
2. That the Committee should ask its Secretary General to take steps to inform the Council, that any further information or explanation that the Council might wish for, would be supplied by the President or by the Reporter;
3. That it must be stated in the *procès-verbal* that the Committee has no wish to advocate the adoption of the results of its labors. Having been asked to give its opinion, the Committee could not press for its adoption without detracting from its dignity.

These three proposals were immediately voted upon and adopted. The text of the project was thereupon signed by the members of the Committee.

The three resolutions had previously been adopted in substance, leaving the question of form to be considered at a later meeting. The form of each having been modified to the approval of the Committee, each one was put to a vote at the request of Mr. Root, and each one was formally and unanimously adopted. The three resolutions were thereupon signed by each of the members.

The task had been accomplished and more than accomplished, because the project for a court had been drafted, a resolution providing for an endless series of conferences at stated periods in succession to the first two Hague Conferences recommended, and the installation of the Academy of International Law in the Peace Palace at The Hague urged. By means of the conferences law will be supplied both for the Permanent Court of Arbitration and the Permanent Court of International Justice, to be applied by arbitrators and administered by magistrates. By means of the Academy a scientific explanation of the law is provided, through masters of international law of various countries, for the benefit of arbitrators of the Court of Arbitration, magistrates of a Permanent Court, members of successive conferences, and, in a word, for the benefit of mankind.

"The day will come," said Mirabeau, "when Right shall be the sovereign of the world."

At three o'clock on the afternoon of July 24th, the Advisory Committee held its closing session. It was hoped that Mr. Léon Bourgeois would be present at the closing session to witness the fruition of the labors of the Committee as he had welcomed its members at the opening session and held up before them the great ideal which it was hoped they would realize. Unable to attend, although invited and anxious to do so, he sent the following telegram:

Detained in the French Senate by the daily discussion of the budget, I deeply regret not to be able to accept the invitation of the Jurists' Committee to attend their official closing session to-morrow and bring them in person the expression of the gratitude of the Council. I have not yet been acquainted with the projects adopted by the Committee, but the incontestable authority of its members makes us feel sure that their resolutions will provide the Council of the League with all necessary elements for the establishment in the near future of the great institution which is so powerfully to contribute in enforcing the rule of right in the world.[2]

[2] League of Nations, *Official Journal*, July-August, 1920. p. 238.

Baron Descamps, President of the Advisory Committee, delivered an appropriate closing address, which is not only that but a report of the Committee as well. It follows in full:

When the International Committee of Jurists named by the Council of the League of Nations to prepare a plan of organization for a Permanent Court of International Justice met for the first time in public session in this palace, the dominating impression of all the members was that of the formidable responsibility which they had assumed.

Assuredly we had at that time every desire to achieve success, but nevertheless we knew that the best intentions and the most earnest efforts are not always sufficient to bring about the desired results.

We had a very clear view of the end to be sought, but the road which had to be followed to reach it was a long one, and it appeared to us to be sown with so many obstacles that we could only ask ourselves if it would be given to us to surmount them.

The efforts attempted in 1907 by a world assembly of the Powers towards the organization of a Permanent Court of Arbitral Justice and in the direction of obligatory arbitration were also present to increase our apprehensions.

Having in mind the grandeur of the task to be accomplished and of the progress which it would involve for the good of all nations, we dedicated ourselves to our work, guarding ourselves from that scepticism which is fashionable among many, but applying to the study of the problems which stood before us that systematic doubt of Descartes which, when well applied, is a powerful instrument of light and the surest guarantee of positive results.

We commenced by long exchanges of views and submitted our opinions, which were sometimes divergent, to the most severe examination. In just such an atmosphere of free and living criticism the hopes of a common agreement amongst us were born and brought into full life.

We cannot certainly flatter ourselves upon having created a perfect work. The material before us does not indeed permit of that, and without doubt it is fitting to recall here that descriptive expression of Portalis in the preliminary part of the Civil Code: "It is absurd to abandon one's self to absolute ideas of perfection in matters which are susceptible to only a relative degree of good." But we nevertheless have the consciousness of being able to propose to the nations a general system of international justice whose projection in the future it seems to us should be happy and very fruitful.

In the work of elaboration to which we set ourselves, we decided that we should not lock ourselves up in a secret chamber inaccessible to the ordinary man. We are glad indeed to have kept the general public in touch with our discussions. Now that these discussions are terminated and while reserving, as is necessary, to those from whom authority flows, the text of the sixty-two articles forming the project agreed upon by us, we believe we can nevertheless respond to the universal

interest by giving in a résumé what the press has already published and in outlining in a general manner the scheme of our labors.

Three great problems have especially called for our consideration.

The first is that of the organization of the Court of International Justice. It appeared to us necessary at the outset to set off sharply the place to be occupied by the new institution amongst the different bodies which together form the ensemble of international jurisdiction. It was a question of creating a Court of Justice truly permanent, directly accessible to the parties and composed of magistrates who should be independent, chosen without regard to their nationality amongst persons held in the highest moral esteem and either fulfilling the conditions required in their respective countries for the exercise of the highest judicial positions, or being jurists well known for their competence in international law.

It is an existing and proved institution, the present Court of Arbitration of The Hague, which we have taken as the basis of the new organization in the sense that we have deemed it wise to entrust to the members of this court the task of proceeding by national groups to the nomination of a restricted number of persons capable of fulfilling the functions of members of the court. And we have asked each national group, in order to secure the best advice in its choice, to consult in the respective countries the highest court of justice, the faculties and schools of law, the national academies, and the national sections of international academies devoted to the study of law.

Two names are to be chosen by each of these national groups without distinction as to nationality.

The final choice, however, is left to the Assembly and the Council of the League of Nations in such manner that the election of the members of the court can come about only through the joint action of the one with the other.

Moreover we have adopted a series of provisions which on the one hand directs the selections toward giving representation to the great divisions of civilization and to the principal judicial systems of the world in such a way as to give the court a truly world-wide constitution, and which on the other hand provides suggestions in cases where accord is not established between the Council and the Assembly.

As regards the functioning of the court, we have provided for the annual formation of a chamber of three judges called to sit in cases of summary procedure when the parties demand it.

The second capital question upon which our attention was naturally centered was the competence of the court. Our principal effort was directed towards two objectives: First, the realization of a system of obligatory adjudication in differences of a judicial nature and by extension in all other differences so far as they may be covered by either general or special conventions between the parties. The declarations made and the engagements undertaken by the Second Peace Conference in 1907 served as the point of departure in this connection.

Next we attempted to lay down the rules of judicial interpretation

which the judges should apply in the examination of cases submitted to them.

The third point was the object of very particular consideration, namely, procedure before the court. We believe that we have satisfactorily solved a rather large number of questions of this sort, notably as to the measures to be taken at the outset of certain cases, as to the intervention of third parties in disputes, and as to the conditions under which judgments may be rendered by default.

If there be added to the provisions contained in the project two recommendations, the first for the methodical continuation of the work undertaken by the first Hague Conferences for the advancement of international law, and second the creation of a High Court of International Justice to judge future crimes against public international order and international law, and finally the recommendation for the early functioning of the Academy of International Law at The Hague, we shall then have a general view of the field in which our activity has taken place. The reception which has been given us in the Capital of the Netherlands by Her Majesty the Queen, the many cordial attentions paid us by the Foreign Minister and the vice president of our Committee as well as by so many other persons and institutions whose names spring to my mind at this moment impose upon us the pleasant duty of expressing here our feelings of deep gratitude. We do not doubt that the Council of the League of Nations will join with us in expressing in its turn its gratitude for the reception given its representatives. We express the wish that our stay upon Dutch soil may be fruitful for the well-being of the country which has so well received us, for the rapproachement of peoples towards international justice and for the good of humanity.[3]

As Mr. van Karnebeek, Minister of Foreign Affairs of the Netherlands, graced the opening session with his presence and charmed its members with his words, so at the closing session, he appeared as the representative of the devoted little country of the Netherlands to express to the members of the Committee, upon their departure, not merely the pleasure of entertaining them as hosts but satisfaction at the result accomplished. "The Dutch people," he said, "glad and proud that you should have honored The Hague with your presence, has followed the course of your work with keen interest. The interesting *communiqués* which have indicated regularly the progress made and the nature and bearings of your deliberations, have enabled the public to form an idea of the difficulty and nature of your task and to appreciate the success which has crowned your concentrated efforts."

Congratulating them upon the project for a court which the Advisory Committee had unanimously adopted, expressing the hope that it would be accepted and put into execution in the near future, and stating that

[3] League of Nations, *Official Journal*, July-August, 1920, p. 238.

it was not for him to discourse upon the merits of their work, he continued:

Please allow me, however, to tell you that the honor which you have paid my country by naming in your project the city where you have met as the future seat of the Court of Justice has been deeply appreciated. Your unanimous agreement in this matter has deeply touched my compatriots and I am sure I interpret their sincere desire to surround the great institution of world justice, the basis of which you have elaborated, with all the marks of respect and devotion which a people, happy to serve the cause of international law with all its strength, is capable of giving in conformity with its cherished and continuing traditions.[4]

Passing to the resolutions of the Committee, he continued:

The wish which you formulated regarding the regular convocation of international conferences, called as successors to the two first Hague Conferences, and that which aims at the launching into activity of the Academy of International Law, founded at The Hague in 1913, call forth precious memories which are indeed dear to us. If these wishes reach fulfilment, your conference, Gentlemen, will have contributed largely to the surrounding of the Court of Justice with a system of international law and of judicial ideas which together are indispensable to the reign of law in international relations.[5]

And in words which indicated more than mere willingness to secure the meeting of conferences for the advancement of law in succession to the First and Second Hague Conferences, he said, "I beg to assure you that the Government of the Queen accepts the obligation to give answer to the appeal which you have made for its aid and collaboration."

Such is the project drafted by the Advisory Committee for the selection of the judges, the composition, the jurisdiction and procedure of an International Court of Justice which the members of the Advisory Committee were invited to prepare and which they actually prepared in the Peace Palace at The Hague. Such are the resolutions which the Committee drafted and adopted.

It will be observed that the proposed Permanent Court of International Justice depends for its creation upon the approval of the Council and the Assembly of the League of Nations, and its continuance and successful operation may likewise depend upon the existence of the League. If the League continues and grows in strength and power, usefulness and influence, as its partisans hope and expect, the court, as its organ,

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[4] League of Nations, *Official Journal*, July-August, 1920, p. 240.

[5] *Ibid.*, p. 241.

will be in no danger. If, on the contrary, the League should decline and cease to exist, what of the court? Will it drop by the wayside? Not necessarily. One of the Conferences for the Advancement of International Law recommended by the Advisory Committee of Jurists would only need, in so far as the court is concerned, to invest the diplomatic representatives of the nations accredited to The Hague with the functions of the Assembly of the League, and an executive committee of these diplomatic representatives, composed as is the Council, if they so desire, with the functions of the Council in the matter of the court.

All roads, we are informed, lead to Rome. It is fortunate for the administration of international justice that more than one road leads to The Hague.

I am, gentlemen,

Very respectfully yours,

JAMES BROWN SCOTT,
*Secretary of the Carnegie Endowment for International Peace,*
*Director of its Division of International Law.*

THE HAGUE, HOLLAND,
*July 24, 1920.*

# Annex A

## PROJECT FOR A PERMANENT COURT OF INTERNATIONAL JUSTICE

*Avant-Projet pour l'établissement de la Cour Permanente de Justice Internacionale visée à l'Article 14 du Pacte de la Société des Nations présenté au Conseil de la Société par le Comité Consultatif de Juristes.*[1]

ARTICLE 1

Indépendamment de la Cour d'Arbitrage, organisée par les Conventions de La Haye de 1899 et 1907, et des Tribunaux spéciaux d'Arbitres, auxquels les Etats demeurent toujours libres de confier la solution de leurs différends, il est institué, conformément à l'article 14 du Pacte de la Société des Nations, une Cour Permanente de Justice Internationale, directement accessible aux parties.

*Draft-Scheme for the institution of the Permanent Court of International Justice mentioned in Article 14 of the Covenant of the League of Nations presented to the Council of the League by the Advisory Committee of Jurists.*[2]

ARTICLE 1

A Permanent Court of International Justice, to which Parties shall have direct access, is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organised by the Hague Conventions of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

### CHAPITRE I

*Organisation de la Cour*

ARTICLE 2

La Cour Permanente de Justice Internationale est un corps de magistrats indépendants, élus, sans égard à leur nationalité, parmi les personnes jouissant de la plus haute considération morale, et qui réunissent les conditions requises pour

### CHAPTER I

*Organisation of the Court*

ARTICLE 2

The Permanent Court of International Justice shall be composed of a body of independent judges, elected, regardless of their nationality, from amongst persons of high moral character, who possess the qualifications required, in their re-

[1] League of Nations, *Official Journal*, Special Supplement No. 2, September, 1920.

[2] Official translation. *Ibid.*

l'exercice, dans leurs pays respectifs, des plus hautes fonctions judiciaries, ou qui sont des jurisconsultes possédant une compétence notoire en matière de droit international.

ARTICLE 3

La Cour se compose de 15 membres: 11 juges titulaires et 4 juges suppléants. Le nombre des juges titulaires et des juges suppléants peut être éventuellement augmenté par l'Assemblée, sur la proposition du Conseil de la Société des Nations, à concurrence de 15 juges titulaires et de 6 juges suppléants.

ARTICLE 4

Les membres de la Cour sont élus par l'Assemblée et par le Conseil sur une liste de personnes présentées par les groupes nationaux de la Cour d'Arbitrage, conformément aux dispositions suivantes.

ARTICLE 5

Trois mois au moins avant la date de l'élection, le Secrétaire Général de la Société des Nations invite par écrit les membres de la Cour d'Arbitrage appartenant à des Etats mentionnés à l'Annexe au Pacte ou entrés ultérieurement dans la Société des Nations, à procéder par groupes nationaux à la présentation de personnes en situation de remplir les fonctions de membres de la Cour.

spective countries, for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law.

ARTICLE 3

The Court shall consist of 15 members: 11 judges and 4 deputy-judges. The number of judges and deputy-judges may be hereafter increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of 15 judges and 6 deputy-judges.

ARTICLE 4

The members of the Court shall be elected by the Assembly and the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

ARTICLE 5

At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration, belonging to the States mentioned in the Annex to the Covenant or to the States which shall have joined the League subsequently, inviting them to undertake, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

Chaque groupe ne peut en aucun cas présenter plus de deux personnes, sans distinction de nationalité.

ARTICLE 6

Avant de procéder à cette désignation il est recommandé à chaque groupe national de consulter la plus Haute Cour de Justice, les Facultés et Ecoles de Droit, les Académies nationales et les sections nationales d'Académies internationales, vouées à l'étude du droit.

ARTICLE 7

Le Secrétaire Général de la Société des Nations dresse, par ordre alphabétique, une liste de toutes les personnes ainsi désignées: seules ces personnes sont éligibles, sauf le cas prévu à l'article 12 paragraphe 2.

Le Secrétaire Général communique cette liste à l'Assemblée et au Conseil.

ARTICLE 8

L'Assemblée et le Conseil procèdent, indépendamment l'une de l'autre, à l'élection, d'abord des juges titulaires, ensuite des juges suppléants.

ARTICLE 9

Dans toute élection, les électeurs veillent à ce que les personnes appelées à faire partie de la Cour, non seulement réunissent individuellement les conditions requises, mais assurent dans l'ensemble la représentation des grandes formes

No group may nominate more than two persons; the nominees may be of any nationality.

ARTICLE 6

Before making these nominations, each national group is hereby recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

ARTICLE 7

The Secretary-General of the League of Nations shall prepare a list in alphabetical order, of all the persons thus nominated. These persons only shall be eligible for appointment, except as provided in Article 12 paragraph 2.

The Secretary-General shall submit this list to the Assembly and to the Council.

ARTICLE 8

The Assembly and the Council shall proceed to elect by independent votings first the judges and then the deputy-judges.

ARTICLE 9

At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilisation and

de civilisation et des principaux systèmes juridiques du monde.

ARTICLE 10

Sont élus ceux qui ont réuni la majorité absolue des voix dans l'Assemblée et dans le Conseil.

Au cas où le double scrutin de l'Assemblée et du Conseil se porterait sur plus d'un membre de la même nationalité, le plus âgé est seul élu.

ARTICLE 11

Si après la première séance d'élection il reste encore des sièges à pourvoir, il est procédé de la même manière à une seconde, puis à une troisième.

ARTICLE 12

Si après la troisième séance d'election il reste encore des sièges à pourvoir, il peut être à tout moment formé sur la seule demande, soit de l'Assemblée, soit du Conseil, une Commission médiatrice de six membres, nommés trois par l'Assemblée, trois par le Conseil, en vue de choisir pour chaque siège non pourvu un nom à présenter à l'adoption séparée de l'Assemblée et du Conseil.

Peuvent être portées sur cette liste, à l'unanimité toutes personnes satisfaisant aux conditions requises, alors même qu'elles n'auraient pas figuré sur la liste de présentation de la Cour d'Arbitrage.

the principal legal systems of the world.

ARTICLE 10

Those candidates who obtain an absolute majority of votes in the Assembly and the Council shall be considered as elected.

In the event of more than one candidate of the same nationality being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

ARTICLE 11

If, after the first sitting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third sitting shall take place.

ARTICLE 12

If after the third sitting one or more seats still remain unfilled, a joint Conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Committee is unanimously agreed upon any person who fulfils the required conditions he may be included in its list, even though he was not included in the list of nominations made by the Court of Arbitration.

Si par le moyen de la Commission médiatrice l'élection n'a pu être faite, les membres de la Cour déjà nommés pourvoient dans un délai à fixer par le Conseil aux sièges vacants, en choisissant parmi les personnes qui ont eu des voix, soit à l'Assemblée soit au Conseil.

Si parmi les juges il y a partage égal des voix, la voix du juge le plus âgé l'emporte.

ARTICLE 13

Les membres de la Cour sont élus pour neuf ans.

Ils sont rééligibles.

Ils restent en fonction jusqu'à leur remplacement. Après ce remplacement, ils continuent de connaître des affaires dont ils sont déjà saisis.

ARTICLE 14

Il est pourvu aux sièges devenus vacants selon la méthode suivie pour la première élection. Le membre de la Cour élu en remplacement d'un membre dont le mandat n'est pas expiré achève le terme du mandat de son prédécesseur.

ARTICLE 15

Les juges suppléants sont appelés dans l'ordre du tableau.

Le tableau est dressé par la Cour, en tenant compte d'abord de la

If the Joint Conference is not successful in procuring an election, those members of the Court who have already been appointed shall, within a time limit to be arranged by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

ARTICLE 13

The members of the Court shall be elected for nine years.

They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall complete any cases which they may have begun.

ARTICLE 14

Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member, the period of whose appointment has not expired, will hold the appointment for the remainder of his predecessor's term.

ARTICLE 15

Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court, having regard first to the

priorité d'élection et ensuite de l'ancienneté d'âge.

ARTICLE 16

L'exercice de toute fonction qui relève de la direction politique, soit nationale, soit internationale, des Etats, est incompatible avec la qualité de membre de la Cour.

En cas de doute, la Cour décide.

ARTICLE 17

Les membres de la Cour ne peuvent exercer les fonctions d'agent, de conseil ou d'avocat dans aucune affaire d'ordre international.

Ils ne peuvent participer au règlement d'aucune affaire dans laquelle ils sont antérieurement intervenus comme agents, conseils ou avocats de l'une des parties, membres d'un tribunal national ou international, d'une commission d'enquête, ou à tout autre titre.

En cas de doute la Cour décide.

ARTICLE 18

Les membres de la Cour ne peuvent être relevés de leurs fonctions que si, au jugement unanime des autres membres, ils ont cessé de répondre aux conditions requises.

Le Secrétaire Général de la Société des Nations en est officiellement informé.

Cette communication emporte vacance de siège

order in time of each election and secondly to age.

ARTICLE 16

The exercise of any function which belongs to the political direction, national or international, of States, by the Members of the Court during their terms of office is declared incompatible with their judicial duties.

Any doubt upon this point is settled by the decision of the Court.

ARTICLE 17

No member of the Court can act as agent, counsel or advocate in any case of an international nature.

No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel, or advocate for one of the contesting parties, or as a member of a national or international Court, or of a Commission of Inquiry, or in any other capacity.

Any doubt upon this point is settled by the decision of the Court.

ARTICLE 18

A member of the Court cannot be dismissed unless, in the unanimous opinion of the other Members, he has ceased to fulfil the required conditions.

When this happens a formal notification shall be given to the Secretary-General.

This notification makes the place vacant.

ARTICLE 19

En dehors de leur propre pays, les membres de la Cour jouissent des mêmes privilèges et immunités que les agents diplomatiques.

ARTICLE 20

Tout membre de la Cour doit, avant d'entrer en fonction, en séance publique prendre engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience.

ARTICLE 21

La Cour élit, pour trois ans, son Président et son Vice-Président; ils sont rééligibles.

Elle nomme son Greffier.

La fonction de Greffier de la Cour n'est pas incompatible avec celle de Secrétaire Général de la Cour Permanente d'Arbitrage.

ARTICLE 22

Le siège de la Cour est fixé à la Haye.

Le Président et le Greffier résident au siège de la Cour.

ARTICLE 23

La Cour tient une session chaque année.

Sauf disposition contraire du règlement d'ordre de la Cour, cette session commence le 15 juin, et continue tant que le rôle n'est pas épuisé.

Le Président convoque la Cour

ARTICLE 19

The members of the Court, when outside their own country, shall enjoy the privileges and immunities of diplomatic representatives.

ARTICLE 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

ARTICLE 21

The Court shall elect its President and Vice-President for three years: they may be re-elected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be considered incompatible with those of Secretary-General of the Permanent Court of Arbitration.

ARTICLE 22

The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

ARTICLE 23

A session shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on the 15th June, and shall continue for so long as may be necessary to complete the cases on the list.

The President may summon an

en session extraordinaire quand les circonstances l'exigent.

ARTICLE 24

Si, pour une raison spéciale, l'un des membres de la Cour estime ne pouvoir participer au jugement d'une affaire déterminée, il en fait part au Président.

Si le Président estime qu'un des membres de la Cour ne peut siéger, pour une raison spéciale, dans une affaire déterminée, il en avertit le membre intéressé.

Si l'un et l'autre ne sont pas d'accord dans chacun de ces cas sur l'attitude à prendre, la Cour décide.

ARTICLE 25

Sauf exception expressément prévue, la Cour exerce ses attributions en séance plénière.

Si la présence de 11 juges titulaires n'est pas assurée ce nombre est parfait par l'entrée en fonction des juges suppléants.

Toutefois, si 11 juges ne sont pas disponibles, le quorum de 9 est suffisant pour constituer la Cour.

ARTICLE 26

En vue de la prompte expédition des affaires, la Cour compose annuellement une chambre de trois juges, appelée à statuer en procédure sommaire, lorsque les parties le demandent.

extraordinary meeting of the Court whenever necessary.

ARTICLE 24

If, for some special reason, a member of the Court considers that he cannot take part in the decision of a particular case, he shall so inform the President.

If, for some special reason, the President considers that one of the members of the Court should not sit on a particular case, he shall give notice to the member concerned.

In the event of the President and the member not agreeing as to the course to be adopted in any such case, the matter shall be settled by the decision of the Court.

ARTICLE 25

The full Court shall sit except when it is expressly provided otherwise.

If 11 judges cannot be present, deputy-judges shall be called upon to sit in order to make up this number.

If, however, 11 judges are not available, a quorum of 9 judges shall suffice to constitute the Court.

ARTICLE 26

With a view to the speedy despatch of business the Court shall form, annually, a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

ARTICLE 27

La Cour détermine par un règlement d'ordre le mode suivant lequel elle exerce ses attributions. Elle règle spécialement la procédure sommaire.

ARTICLE 28

Les juges de la nationalité de chacune des parties en cause conservent le droit de siéger dans l'affaire dont la Cour est saisie.

Si la Cour compte sur le siège un juge de la nationalité d'une seule des parties, l'autre partie peut désigner pour siéger un juge suppléant s'il s'en trouve un de sa nationalité. S'il n'en existe pas, elle peut choisir un juge, pris de préférence parmi les personnes qui ont été l'objet d'une présentation de la part des groupes nationaux de la Cour d'Arbitrage.

Si la Cour ne compte sur le siège aucun juge de la nationalité des parties, chacune de ces parties peut procéder à la désignation ou au choix d'un juge de la même manière qu'au paragraphe précédent.

Lorsque plusieurs parties font cause commune, elles ne comptent pour l'application des dispositions qui précèdent que pour une seule.

Les juges désignés ou choisis comme il est dit aux §§ 2 et 3 du présent article, doivent satisfaire aux prescriptions des articles 2, 16, 17, 20, 24 du présent Acte. Ils statuent sur un pied d'égalité avec leurs collègues.

ARTICLE 27

The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

ARTICLE 28

Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates by a national group of the Court of Arbitration.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

ARTICLE 29

Les juges titulaires reçoivent un traitement annuel à fixer par l'Assemblée de la Société des Nations sur la proposition du Conseil. Ce traitment ne peut être diminué pendant la durée des fonctions du juge.

Le Président reçoit une indemnité spéciale déterminée de la même manière pour la durée de ses fonctions.

Les juges suppléants reçoivent dans l'exercice de leurs fonctions une indemnité à fixer de la même manière.

Les juges titulaires et suppléants qui ne résident pas au siège de la Cour reçoivent le remboursement des frais de voyages nécessités par l'accomplissement de leurs fonctions.

Les indemnités dues aux juges désignés ou choisis conformément à l'article 28 sont réglées de la même manière.

Le traitment du Greffier est fixé par le Conseil sur la proposition de la Cour.

Un règlement spéciale détermine les pensions auxquelles ont droit les juges et le Greffier.

ARTICLE 30

Les frais de la Cour sont supportés par la Société des Nations de la manière que l'Assemblée décide sur la proposition du Conseil.

ARTICLE 29

The judges shall receive an annual salary to be determined by the Assembly of the League of Nations upon the proposal of the Council. This salary must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

Deputy-judges shall receive a grant, for the actual performance of their duties, to be fixed in the same way.

Travelling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 28 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

A special regulation shall provide for the pensions to which the judges and Registrar shall be entitled.

ARTICLE 30

The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

## CHAPITRE II

*Compétence de la Cour*

ARTICLE 31

La Cour connaît des litiges entre Etats.

ARTICLE 32

La Cour est ouverte aux Etats mentionnés à l'Annexe au Pacte et à ceux qui seront ultérieurement entrés dans la Société des Nations.

Elle est accessible aux autres Etats.

Les conditions auxquelles elle est ouverte ou accessible aux Etats qui ne sont pas Membres de la Société des Nations, sont réglées par le Conseil, en tenant compte de l'article 17 du Pacte.

ARTICLE 33

Lorsqu'un différend surgit entre Etats, qu'il n'a pu être réglé par la voie diplomatique et que l'on n'est pas convenu de choisir une autre juridiction, la partie qui se prétend lésée peut en saisir la Cour. La Cour, après avoir décidé s'il est satisfait aux prescriptions précédentes, statue sous les conditions et limitations déterminées par l'article suivant.

## CHAPTER II

*Competence of the Court*

ARTICLE 31

The Court shall have jurisdiction to hear and determine suits between States.

ARTICLE 32

The Court shall be open of right to the States mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations.

Other States may have access to it.

The conditions under which the Court shall be open of right or accessible to States which are not Members of the League of Nations shall be determined by the Council, in accordance with Article 17 of the Covenant.

ARTICLE 33

When a dispute has arisen between States, and it has been found impossible to settle it by diplomatic means, and no agreement has been made to choose another jurisdiction, the party complaining may bring the case before the Court. The Court shall, first of all, decide whether the preceding conditions have been complied with; if so, it shall hear and determine the dispute according to the terms and within the limits of the next Article.

ARTICLE 34

Entre Etats Membres de la Société des Nations la Cour statue sans convention spéciale sur les différends d'ordre juridique, qui ont pour objet:

*a*) L'interprétation d'un traité;

*b*) Tout point de droit international;

*c*) La réalité de tout fait, qui, s'il était établi, constituerait la violation d'un engagement international;

*d*) La nature ou l'étendue de la réparation due pour la rupture d'un engagement international;

*e*) L'interprétation d'une sentence rendue par la Cour.

La Cour connaît également de tous différends, de quelque nature qu'ils soient, qui lui sont soumis par la convention soit générale, soit spéciale, des parties.

En cas de contestation sur le point de savoir si un différend rentre dans les catégories ci-dessus visées, la Cour décide.

ARTICLE 35

Dans les limites de sa compétence, telle qu'elle est déterminée par l'article 34, la Cour applique en ordre successif:

1°) Les conventions internationales soit générales, soit spéciales, établissant des règles expressément reconnues par les Etats en litige,

ARTICLE 34

Between States which are Members of the League of Nations, the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature, concerning:

(*a*) The interpretation of a treaty;

(*b*) Any question of international law;

(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) The nature or extent of reparation to be made for the breach of an international obligation;

(*e*) The interpretation of a sentence passed by the Court.

The Court shall also take cognisance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties.

In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the Court.

ARTICLE 35

The Court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following:

(1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

2°) La coutume internationale, attestation d'une pratique commune acceptée comme loi;

3°) Les principes généraux de droit reconnus par les nations civilsées;

4°) Les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations comme moyens auxiliaires de détermination des règles de droit.

ARTICLE 36

La Cour donne son avis sur tout point ou tout différend d'ordre international qui lui est soumis par le Conseil ou par l'Assemblée.

Lorsque la Cour donne son avis sur un point d'ordre international indépendamment de tout différend actuellement né elle constitue une Commission spéciale de 3 à 5 membres.

Lorsqu'elle donne son avis sur une question qui fait l'objet d'un différend actuellement né elle statue dans les mêmes conditions que s'il s'agissait d'un litige porté devant elle.

(2) International custom, as evidence of a general practice, which is accepted as law;

(3) The general principles of law recognized by civilized nations;

(4) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

ARTICLE 36

The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members.

When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.

## CHAPITRE III

*Procédure*

ARTICLE 37

La langue de la Cour est le français.

La Cour peut, à la demande des parties, autoriser l'emploi d'une

## CHAPTER III

*Procedure*

ARTICLE 37

The official language of the Court shall be French.

The Court may, at the request of the contesting parties, authorise

autre langue devant elle.

ARTICLE 38

La Cour est saisie par une requête adressée au Greffe.

La requête indique l'objet du différend et désigne les parties en cause.

Le Greffe fait immédiatement notification de la requête aux intéressés.

Il en informe également les Membres de la Société des Nations par l'entremise du Secrétaire Général.

ARTICLE 39

Dans le cas où la cause du différend consiste en un acte effectué ou sur le point de l'être, la Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.

En attendant l'arrêt définitif l'indication de ces mesures est immédiatement transmis aux parties et au Conseil.

ARTICLE 40

Les parties sont représentées par des agents.

Elles peuvent se faire assister devant la Cour par des conseils ou des avocats.

ARTICLE 41

La procédure a deux phases: l'une écrite, l'autre orale.

another language to be used before it.

ARTICLE 38

A State desiring to have recourse to the Court shall lodge a written application addressed to the Registrar.

The application shall indicate the subject of the dispute, and name the contesting parties.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

ARTICLE 39

If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

ARTICLE 40

The parties shall be represented by agents.

They may have Counsel or Advocates to plead before the Court.

ARTICLE 41

The procedure shall consist of two parts: written and oral.

ARTICLE 42

La procédure écrite comprend la communication à juge et à partie des mémoires, des contremémoires, et, eventuellement, des répliques, ainsi que de toute pièce et document à l'appui.

La communication se fait par l'entremise du Greffe dans l'ordre et les délais déterminés par la Cour.

Toute pièce produite par l'une des parties doit être communiquée à l'autre en copie certifiée conforme.

ARTICLE 43

La procédure orale consiste dans l'audition par la Cour des témoins, experts, agents, conseils et avocats.

Pour toute notification à faire à d'autres personnes que les agents, conseils et avocats, la Cour s'adresse directement au Gouvernement de l'Etat sur le territoire duquel la notification doit produire effet.

Il en est de même s'il s'agit de faire procéder sur place à l'établissement de tous moyens de preuve.

ARTICLE 44

Les débats sont dirigés par le Président et à défaut de celui-ci par le Vice-Président; en cas d'empêchement, par le plus ancien des juges présents.

ARTICLE 42

The written proceedings shall consist of the communication to the judges and to the parties of statements of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

ARTICLE 43

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

ARTICLE 44

The proceedings shall be under the direction of the President, or in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

ARTICLE 45

L'audience est publique, à moins qu'il n'en soit autrement décidé par la Cour à la demande motivée de l'une des parties.

ARTICLE 46

Il est tenu de chaque audience un procès-verbal signé par le Greffier et le Président.

Ce procès-verbal a seul caractère authentique.

ARTICLE 47

La Cour rend des ordonnances pour la direction du procès, la détermination des formes et délais dans lesquels chaque partie doit finalement conclure; elle prend toutes les mesures que comporte l'administration des preuves.

ARTICLE 48

La Cour peut, même avant tout débat, demander aux agents de lui produire tout document et de lui fournir toutes explications. En cas de refus, elle en prend acte.

ARTICLE 49

A tout moment, la Cour peut confier une enquête ou une expertise à toute personne, corps, bureau, commission ou organe de son choix.

ARTICLE 45

The hearing in Court shall be public, unless the Court, at the written request, of one of the parties, accompanied by a statement of his reasons, shall otherwise decide.

ARTICLE 46

Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

ARTICLE 47

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and made all arrangements connected with the taking of evidence.

ARTICLE 48

The Court may, even before the hearing begins, call upon the agents to produce any document, or to supply to the Court any explanations. Any refusal shall be recorded.

ARTICLE 49

The Court may, at any time, entrust any individual, bureau, commission or other body that it may select, with the task of carrying out an inquiry or giving an expert opinion.

ARTICLE 50

Au cours des débats, les juges posent aux témoins, agents, experts, avocats et conseils toutes questions qu'ils estiment utiles; les agents, avocats et conseils ont le droit de poser, par l'entremise du Président, toute question que la Cour juge utile.

ARTICLE 51

Après avoir reçu les preuves et témoignages dans les délais déterminés par elle, la Cour peut écarter toutes dépositions ou documents nouveaux qu'une des parties voudrait lui présenter sans l'assentiment de l'autre.

ARTICLE 52

Lorsqu'une des parties ne se présente pas, ou s'abstient de faire valoir ses moyens, l'autre partie peut demander à la Cour de lui adjuger ses conclusions.

La Cour, avant d'y faire droit, doit s'assurer non seulement qu'elle a compétence aux termes des articles 33 et 34, mais que les conclusions reposant sur des preuves sérieuses, sont fondées en fait et en droit.

ARTICLE 53

Quand les agents, avocats et conseils ont fait valoir, sous le contrôle de la Cour, tous les moyens qu'ils jugent utiles, le Président prononce la clôture des débats.

ARTICLE 50

During the hearing in Court, the judges may put any questions, considered by them to be necessary, to the witnesses, agents, experts, advocates or counsel. The agents, advocates and counsel shall have the right to ask, through the President, any questions that the Court considers useful.

ARTICLE 51

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other agrees.

ARTICLE 52

Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 33 and 34, but also that the claim is supported by substantial evidence and well founded in fact and law.

ARTICLE 53

When the agents, advocates and counsel, subject to the control of the Court, have presented all the evidence, and taken all other steps that they consider advisable, the

La Cour se retire en chambre du conseil pour délibérer.

Les délibérations de la Cour sont et restent secrètes.

President shall declare the case closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

Article 54

Les décisions de la Cour sont prises à la majorité des juges présents.

En cas de partage de voix, la voix du Président ou de celui qui le remplace est prépondérante.

Article 54

All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

Article 55

L'arrêt est motivé.

Il mentionne les noms des juges qui y ont pris part.

Article 55

The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

Article 56

Si l'arrêt n'exprime pas, en tout ou en partie, l'opinion unanime des juges, les dissidents ont la faculté de demander que leur opposition ou leurs réserves soient constatées, mais sans indication des motifs.

Article 56

If the judgment given does not represent, wholly or in part, the unanimous opinion of the judges, the dissenting judges shall be entitled to have the fact of their dissent or reservations mentioned in it. But the reasons for their dissent or reservations shall not be expressed in the judgment.

Article 57

L'arrêt est signé par le Président et par le Greffier. Il est lu en séance publique, les agents dûment prévenus.

Article 57

The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

ARTICLE 58

L'arrêt est définitif et sans recours. En cas de dispute sur le sens et la portée de l'arrêt, il appartient à la Cour de l'interpréter, à la demande de toute partie.

ARTICLE 59

La révision de l'arrêt ne peut être éventuellement demandée à la Cour qu'à raison de la découverte d'un fait nouveau de nature à exercer une influence décisive et qui, avant le prononcé de l'arrêt, était inconnu de la Cour et de la partie qui demande la revision, sans qu'il y ait, de sa part, faute à l'ignorer.

La procédure de revision s'ouvre par un arrêt de la Cour constatant expressément l'existence du fait nouveau, lui reconnaissant les caractères qui donnent ouverture à la revision, et déclarant de ce chef la demande recevable.

La Cour peut subordonner l'ouverture de la procédure en revision à l'exécution préalable de l'arrêt.

Aucune demande de revision ne peut être formée après l'expiration d'un délai de cinq ans.

ARTICLE 60

Lorsqu'un Etat estime que dans un différend un intérêt d'ordre juridique est pour lui en cause, il peut adresser à la Cour une requête, à fin d'intervention.

ARTICLE 58

The judgment is final and without appeal. In the event of uncertainty as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

ARTICLE 59

An application for revision of a judgment can be made only when it is based upon the discovery of some new fact, of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings in revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

No application for revision may be made after the lapse of five years from the date of the sentence.

ARTICLE 60

Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

La Cour décide.

ARTICLE 61

Lorsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres Etats que les parties en litige, le Greffe avertit sans délai tous les signataires.

Chacun d'eux a le droit d'intervenir au procès, et s'il exerce cette faculté, l'interprétation contenue dans la sentence est également obligatoire à son égard.

ARTICLE 62

S'il n'en est autrement décidé par la Cour, chaque partie supporte ses frais de procédure.

It will be for the Court to decide upon this request.

ARTICLE 61

Whenever the construction of a convention, in which States other than those concerned in the case are parties, is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be as binding upon it as upon the original parties to the dispute.

ARTICLE 62

Unless otherwise decided by the Court, each party shall bear its own costs.

# Annex B

## RESOLUTIONS OF THE ADVISORY COMMITTEE [3]

*Premier Vœu*

Le Comité Consultatif de Juristes, réuni à la Haye pour élaborer le statut d'une Cour Permanente de Justice Internationale;

Convaincu que la sécurité des Etats et le bien-être des peuples

*First Resolution* [4]

The Advisory Committee of Jurists, assembled at The Hague to draft a plan for a Permanent Court of International Justice,

Convinced that the security of States and the well-being of peo-

[3] French texts taken from *Rapport sur l'avant-projet pour l'institution de la Cour Permanent de Justice International visée à l'article 14 du Pacte de la Société des nations, présenté au Conseil de la Société au nom du Comité Consultatif de Juristes par Albert de Lapradelle* (The Hague, July 23, 1920), p. 57.

[4] English draft, of which the French text is a translation.

exigent impérieusement l'extension de l'empire du droit et le développement des jurisdictions internationales;

Recommande:

I. Qu'une nouvelle Conférence des Etats faisant suite aux deux premières Conférences de la Haye, soit réunie dans le plus bref délai possible, en vue:

1. de raffermir les règles existantes du droit des gens, spécialement et d'abord dans les domaines affectés par les évènements de la récente guerre;
2. de formuler et sanctionner les modifications et additions dont la nécessité ou l'utilité s'est révélée à l'occasion de la guerre et à raison des changements des conditions de la vie internationale qui ont suivi ce grand conflit;
3. de concilier les vues divergentes et de ménager une entente générale relativement aux règles qui ont donné lieu à controverse;
4. de prendre en considération toute spéciale les points qui, actuellement, ne sont pas réglés d'une manière adéquate et dont la justice internationale réclame la détermination précise dans une entente commune.

II. Que l'Institut de Droit international, l'American Institute of International Law, l'Union juridique internationale, l'International Law Association et l'Institut

ples urgently require the extension of the empire of law and the development of all international agencies for the administration of justice,

Recommends:

I. That a new conference of the nations in continuation of the first two conferences at The Hague be held as soon as practicable for the following purposes:

1. To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war.
2. To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.
3. To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore.
4. To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

II. That the Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association, and the

ibérique de droit comparé, soient invités à instituer tel mode de travail ou de collaboration qui leur paraîtra convenable afin de préparer pour la réalisation de cette œuvre, des avant-projets qui, d'abord soumis aux divers Gouvernements, seraient ensuite présentés à la conférence.

III. Que la Conférence nouvelle prenne le nom de Conférence pour l'avancement du droit international.

IV. Que cette Conférence soit suivie de Conférences périodiques semblables, assez rapprochées pour permettre de continuer, en toute opportunité et fécondité, l'œuvre entreprise, dans ce qu'elle aura d'inachevé.

Iberian Institute of Comparative Law be invited to prepare with such conference or collaboration inter sese as they may deem useful, projects for the work of the Conference to be submitted beforehand to the several Governments and laid before the Conference for its consideration and such action as it may find suitable.

III. That the Conference be named Conference for the Advancement of International Law.

IV. That this Conference be followed by further successive conferences at stated intervals to continue the work left unfinished.

*Deuxième Vœu*

Le Comité Consultatif de Juristes, réuni à la Haye pour élaborer le statut d'une Cour Permanente de Justice Internationale,

Saisi par son président d'une proposition concernant, pour l'avenir, l'établissement d'une Haute Cour de Justice Internationale, formulée en ces termes:

ARTICLE 1

Il est institué une Haute Cour de Justice Internationale.

ARTICLE 2

Cette Cour se compose d'un membre par Etat respectivement,

*Second Resolution*[5]

The Advisory Committee of Jurists, assembled at The Hague to draft a plan for a Permanent Court of International Justice,

Having considered a proposition laid before it by its president for the establishment in the future of a High Court of International Justice, conceived in these terms:

ARTICLE 1

A High Court of International Justice is hereby established.

ARTICLE 2

This Court shall be composed of one member for each state, to be

[5] Translation made especially for this print.

choisi par le groupe des délégués de chaque Etat à la Cour d'Arbitrage.

ARTICLE 3

La Haute Cour de Justice Internationale sera compétente pour juger les crimes contre l'ordre public international et le droit des gens universel, qui lui seront déférés par l'Assemblée plénière de la Société des Nations ou par le Conseil de cette Société.

ARTICLE 4

La Cour possédera un pouvoir appréciateur pour caractériser le délit, fixer la peine et déterminer les moyens appropriés à l'exécution de la sentence. Elles déterminent la procédure à suivre dans ce cas, par son règlement d'ordre intérieur.

Reconnaissant toute l'importance de cette proposition.

En recommande l'examen au Conseil et à l'Assemblée de la Société des Nations.

*Troisième Vœu*

Le Comité Consultatif de Juristes, réuni à la Haye pour élaborer le statut d'une Cour Permanente de Justice Internationale,

Saisit, avec satisfaction, cette occasion d'exprimer le vœu que l'Académie de Droit International fondée à la Haye en 1913, et dont le fonctionnement a été arrêté par les circonstances, entre aussi pro-

chosen by the group of delegates of each state represented in the court of arbitration.

ARTICLE 3

The High Court of Justice shall be competent to try crimes against international public order and the universal law of nations, which shall be referred to it by the Assembly or by the Council of the League of Nations.

ARTICLE 4

The Court shall have power to define the nature of the crime, to fix the penalty and to prescribe the appropriate means of carrying out the judgment. It shall formulate its own rules of procedure.

Recognizing the vast importance of this proposition,

Recommends the examination thereof to the Council and the Assembly of the League of Nations.

*Third Resolution*[5]

The Advisory Committee of Jurists, assembled at The Hague to draft a plan for a Permanent Court of International Justice,

Gladly avails itself of this opportunity to express the hope that the Academy of International Law, founded at The Hague in 1913, and whose operation has, owing to circumstances, been interrupted,

[5] Translation made especially for this print.

chainement que possible en activité à côté de la Cour Permanente d'Arbitrage et de la Cour Permanente de Justice Internationale, au Palais de la Paix, à la Haye.

shall, as soon as possible, enter upon its activity alongside of the Permanent Court of Arbitration and the Permanent Court of International Justice, in the Peace Palace at The Hague.

## Annex C

### COVENANT OF THE LEAGUE OF NATIONS [6]

#### Article 12

The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council.

In any case under this Article the award of the arbitrators shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

#### Article 13

The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.

For the consideration of any such dispute the court of arbitration to which the case is referred shall be the Court agreed on by the parties to the dispute or stipulated in any convention existing between them.

The Members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not re-

[6] U. S. Senate Document No. 49, 66th Cong., 1st sess.

sort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto.

ARTICLE 14

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

ARTICLE 15

If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof. . . .

ARTICLE 16

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not. . . .

ARTICLE 17

In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council. . . .

ARTICLE 21

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.

# APPENDIX

# DRAFT CONVENTION FOR THE CREATION OF A COURT OF ARBITRAL JUSTICE, ADOPTED AND RECOMMENDED TO THE POWERS BY THE SECOND HAGUE PEACE CONFERENCE, OCTOBER 18, 1907[1]

## PART I.—*Constitution of the Court of Arbitral Justice*

### ARTICLE 1

With a view to promoting the cause of arbitration, the contracting Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

### ARTICLE 2

The Court of Arbitral Justice is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are appointed, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present Convention.

### ARTICLE 3

The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention for the pacific settlement of international disputes. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

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[1] *The Proceedings of the Hague Peace Conference: Translation of the Official Texts* (Carnegie Endowment for International Peace, 1920), The Conference of 1907, Vol. I, p. 690.

ARTICLE 4

The judges of the Court of Arbitral Justice are equal, and rank according to the date on which their appointment was notified. The judge who is senior in point of age takes precedence when the date of notification is the same. The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter.

ARTICLE 5

The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously.

ARTICLE 6

The Court annually nominates three judges to form a special delegation, and three more to replace them should the necessity arise. They may be reelected. They are balloted for. The persons who secure the largest number of votes are considered elected. The delegation itself elects its president, who, in default of a majority, is appointed by lot.

A member of the delegation cannot exercise his duties when the Power which appointed him, or of which he is a national, is one of the parties.

The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

ARTICLE 7

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the Court of Arbitral Justice or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

ARTICLE 8

The Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

ARTICLE 9

The judges of the Court of Arbitral Justice receive an annual salary of 6,000 Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present Convention, they receive the sum of 100 florins *per diem*. They are further entitled to receive a traveling allowance fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the Court dealt with in Article 31, and are paid through the International Bureau created by the Convention for the pacific settlement of international disputes.

ARTICLE 10

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

ARTICLE 11

The seat of the Court of Arbitral Justice is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The delegation may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

ARTICLE 12

The Administrative Council fulfils with regard to the Court of Arbitral Justice the same functions as to the Permanent Court of Arbitration.

ARTICLE 13

The International Bureau acts as registry to the Court of Arbitral Justice, and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 14

The Court meets in session once a year. The session opens the third Wednesday in June, and lasts until all the business on the agenda has been transacted.

The Court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a Power is party in a case actually pending before the Court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the delegation may summon the Court in extraordinary session.

ARTICLE 15

A report of the doings of the Court shall be drawn up every year by the delegation. This report shall be forwarded to the contracting Powers through the International Bureau. It shall also be communicated to the judges and deputy judges of the Court.

ARTICLE 16

The judges and deputy judges, members of the Court of Arbitral Justice, can also exercise the functions of judge and deputy judge in the International Prize Court.

PART II.—*Competency and Procedure*

ARTICLE 17

The Court of Arbitral Justice is competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement.

ARTICLE 18

The delegation is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part IV, Chapter IV, of the Convention for the pacific settlement of international disputes is to be applied.

2. To hold an inquiry under and in accordance with Part III of the said Convention, in so far as the delegation is entrusted with such inquiry by the parties acting in common agreement. With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may

sit as judges, if the case in dispute is submitted to the arbitration of the Court or of the delegation itself.

ARTICLE 19

The delegation is also competent to settle the *compromis* referred to in Article 52 of the Convention for the pacific settlement of international disputes if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of:

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

ARTICLE 20

Each of the parties concerned may nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the delegation.

If the delegation acts as a commission of inquiry, this task may be entrusted to persons other than the judges of the Court. The traveling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

ARTICLE 21

The contracting Powers only may have access to the Court of Arbitral Justice set up by the present Convention.

ARTICLE 22

The Court of Arbitral Justice follows the rules of procedure laid down in the Convention for the pacific settlement of international disputes, except in so far as the procedure is laid down in the present Convention.

ARTICLE 23

The Court determines what language it will itself use and what languages may be used before it.

ARTICLE 24

The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 63, paragraph 2, of the Convention for the pacific settlement of international disputes.

ARTICLE 25

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the Power on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the Power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

ARTICLE 26

The discussions are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by one of the parties cannot preside.

ARTICLE 27

The Court considers its decisions in private, and the proceedings are secret.

All decisions are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

ARTICLE 28

The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

ARTICLE 29

Each party pays its own costs and an equal share of the costs of the trial.

ARTICLE 30

The provisions of Articles 21 to 29 are applicable by analogy to the procedure before the delegation.

When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of the member attached is not recorded if the votes are evenly divided.

ARTICLE 31

The general expenses of the Court are borne by the contracting Powers.

The Administrative Council applies to the Powers to obtain the funds requisite for the working of the Court.

ARTICLE 32

The Court itself draws up its own rules of procedure, which must be communicated to the contracting Powers.

After the ratification of the present Convention the Court shall meet as early as possible in order to elaborate these rules, elect the president and vice president, and appoint the members of the delegation.

ARTICLE 33

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the contracting Powers, which will consider together as to the measures to be taken.

PART III.—*Final Provisions*

ARTICLE 34

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

ARTICLE 35

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

## METHODS FOR THE CONSTITUTION OF A PERMANENT COURT OF INTERNATIONAL JUSTICE, PROPOSED TO THE SECOND HAGUE PEACE CONFERENCE, 1907[1]

The experience of The Hague of 1907 showed that the great difficulty in the creation of an international judicial tribunal sprang from the number of the states of the world and the assertion of the principle that all states are equal before the law. A Court which contained representatives of all states would be too big. If a Court of less size is to be constituted, the question arises, by whom and how is the selection of judges to be made? This question was found insoluble in 1907.

If it were possible to find any scheme which is not open to objection, theoretical or practical, we should not have had to record the failure of 1907. When once we abandon the scheme which allows each state to appoint a member directly to the Court, we meet with difficulties; for every alternative scheme involves *selection*. Will a great Power,—at any rate until it is certain that the selection will be made without any political bias,—agree to any scheme which does not give it a very good chance of having one of its nationals on the Court? And, even if assured that the selection would be made purely on considerations of merit, will it not desire to have one of its nationals on the Court, not necessarily as a representative of its interests but as a representative of its dignity and perhaps of its peculiar legal system. It being impossible for all the non-great Powers to have a national on the Court, as near an approach as possible must be made to a scheme

[1] Secretariat of the League of Nations, *Memorandum on the Different Questions arising in connection with the Establishment of the Permanent Court of International Justice* (The Hague, 1920), Sec. 5, p. 21.

which gives them individually or collectively an equal voice with the great powers in the selection of the personnel of the Court. The difficulty is to find such a scheme, a scheme which will give due weight to actual facts while not offending susceptibilities. Another difficulty is this:—In many of the schemes now to be referred to a selection is to be made between nominees put forward by the various states; but will the states be able to find persons of the great position and influence required who are willing to have their relative merits discussed and voted on?[2]

Apart from these difficulties of selection—as regards mode and material—answers to the following questions are given in the various schemes now to be set out:

> Must the candidates be lawyers by profession (judges, jurists, etc.)? In order to lessen the nationalistic factor in the Court shall states be required to nominate other persons than their own nationals?
>
> If the members of the Court are to be elected, are they to be elected one by one or *en bloc?*
>
> Is any limit to be placed on the number of judges who may belong to the same country?
>
> What is to be the size of the full Court?
>
> For how long are judges to be appointed?
>
> In the formation of a working Court for any given case are the disputant states to have a right of challenge?
>
> How are the vacancies to be filled up?

A.—(1) Reference may first be made to the various schemes propounded at The Hague in 1907 for the establishment of an International Court of Justice.[3]

The Russian proposal was that one of the matters to be dealt with annually by the (so-called) "Cour Permanente d'Arbitrage" of The Hague should be the election, by ballot, of three of its members to be, for the year following, ready to form at once the "Tribunal Permanent d'Arbitrage" (See *Actes et documents,* Vol. II, p. 1030).

(2) The proposal of the United States of America contained the following Articles:

> I. A permanent Court of Arbitration shall be created, composed of fifteen judges enjoying the highest moral consideration and admitted competence on questions of international law; they and their successors shall be chosen in the way to be fixed by

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[2] See *Rapport Loder,* p. 102, where similar difficulties are indicated.

[3] See Wehberg, in *Das Werk vom Haag,* Chap. IV (5).

this Conference, but so that the various systems of law and procedure and the various languages shall be suitably represented in the personnel of the Court. The judges shall be appointed for ..... years, or until their successors shall be appointed and shall have accepted.

In no case (unless the Parties expressly agree) shall a judge take part in the consideration or decision of any matter before the Court when his State is one of the Parties.

(See *Actes et documents,* 1907, Vol II, pp. 1031-2.)

It is stated (Holls cited in Lammasch, *op. cit.*) that the United States wished the nomination of candidates to be made by the Supreme Courts of the countries concerned, and not by their Foreign Offices.

(3) Bulgaria proposed amendments to the scheme of the United States, whereby (i) One-third of the Court of fifteen judges was to be chosen afresh every third year; and whereby (ii) Article III was to contain the following provisions:—

Each of the Parties to a dispute has the right to challenge,

(*a*) A judge of the nationality of its opponent;
(*b*) A judge who has previously expressed an opinion on the affair prejudicial to this Party,

Each of the judges shall be entitled to withdraw from the cognisance of an affair when he foresees in one way or another that his participation would imperil the confidence due to the judicial authority.

(*Actes et documents,* 1907, Vol. II, p. 1033.)

(4) A draft Convention was subsequently submitted by Germany, the United States and Great Britain jointly. It contained, in its final edition, the following Articles:

2. The International Court of Justice is composed of judges and deputy-judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts, or be jurists of recognized competence in matters of international law.

The Judges and Deputy-Judges of the Court shall be appointed by the signatory Powers, as far as possible, from the members of the Permanent Court of Arbitration.

3. The Judges and Deputy-Judges are appointed for a period of twelve years, reckoned from the date on which the appointment is notified to the Administrative Council created by the Convention of 29th July, 1899. Their appointments can be renewed.

Should one of the Judges or Deputy-Judges die or resign, the same procedure is followed in filling the vacancy as was followed in appointing him. In this case, the appointment is made for a fresh period of twelve years.

4. The Judges of the International Court of Justice are equal amongst themselves, and rank according to the date of the notification of their appointment (Article 3, para. 1), and, if they sit in accordance with a roster (Article 7, para. 2), according to the date of their entrance on their functions. The Judge who is senior in point of age takes precedence when the date of notification is the same.

The Deputy-Judges are assimilated in the exercise of their functions to the Judges. They rank, however, after the latter.[4]

7. The Judges and Deputy-Judges sit in the order shown in the annexed schedule.

The functions of Judge and of Deputy-Judge may be performed by the same person if this is compatible with the roster shown in the above-named schedule. Subject to the same condition, the same Judge may be appointed by several Powers.

8. If one of the Parties to a dispute has not, according to the roster, a judge sitting in the Court, it can claim that the judge appointed by it shall take part in the judgment of the dispute. In this case it is determined by lot which of the judges on the roster for the given occasion is to withdraw, this exclusion is not to apply to the judge named by the other party to the dispute.

If several Powers are joint-parties in the same dispute, the foregoing provision only applies when none of them already has a judge sitting in the Court. If none of them already has a judge sitting in the Court, it is for the said Parties to come to an understanding and, if need be, to determine the appointment of the judge by lot.

10. A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a National Tribunal, of a Tribunal of Arbitration, or of a Commission of Enquiry, or has figured in the suit as Counsel or advocate for one of the Parties.

No judge can act as agent or advocate before the Court, or the Permanent Court of Arbitration, before a Special Tribunal

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[4] In the three earlier editions of the joint projeet Art. 6 provided:

La Cour fonctionne au nombre de dix-sept juges, neuf juges constituent le quorum nécessaire.

Le juge absent ou empêché est remplacé par le suppléant.

And according to Article 7.

The judges appointed by the eight great Powers (Germany, United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia) were always to sit, while the judges and deputy-judges appointed by the other Powers were to sit in accordance with a rota.

Articles 6 and 7 did not appear, however, in the joint projet which was voted by the Commission.

of Arbitration or a Commission of Enquiry, nor act therein for one of the parties in any capacity whatsoever so long as his appointment lasts.

11. Every three years the Court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority and, in case the votes are equal, by lot.

29. . . . The judge appointed by one of the Parties to the dispute cannot act as President.

(*Actes et documents,* 1907, Vol. II, p. 1054 onwards.)

*Note.*—(I) In the first edition of this draft Convention the Article figuring above as Article 10 contained in addition a paragraph which ran, "In no case, except with the consent of the parties to the dispute, may a judge take part in the examination or discussion of an affair pending before the International High Court of Justice, when the Power which appointed him is one of the Parties" (*Actes et documents,* Vol. II, p. 1035). This, however, was in a part of the draft which was submitted by the United States and Great Britain alone and in which Germany did not concur. Subsequently, the two former Powers, although opposed in principle to the presence in the Court of a judge belonging to a litigant state, gave way to the latter Power in a spirit of compromise (*Actes et documents,* Vol. II, p. 605).

The Articles set out above with the exception of Articles 6 to 8 were incorporated, with modifications in point of form, in the Draft Convention which was approved by the Commission entrusted with the drafting of the Convention. In this Draft the name given to the Court was changed to "Court of Arbitral Justice."

The Draft Convention, however, never got beyond the Draft stage, owing to the impossibility of securing agreement as to the constitution of the Court. Schemes which should satisfy the demand of the smaller States for equality left it possible that the larger States would be swamped and necessitated a Court which would be unwieldily big. The total result was that the Conference expressed in its Final Act a *vœu* as follows:

> The Conference calls the attention of the signatory Powers to the advisability of adopting the annexed draft Convention for the creation of a Judicial Arbitration Court and of bringing it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court.

(5) M. Ruy Barbosa, Brazil, presented a scheme containing the following Articles among others:

(I) In creating the new Permanent Court of Arbitration each Power shall nominate, subject to the conditions laid down in the Convention of 1899, a person able, as member of this institution, to exercise worthily the functions of arbiter.

It shall also be entitled to appoint a Deputy-Judge.

Two or more Powers may agree on a joint nomination of their representatives on the Court.

The same person may be nominated by different Powers.

The signatory Powers shall, so far as possible, choose their representatives on the new Court from members of the existing Court (*i. e.*, the so-called "Permanent Court of Arbitration" of the Hague).

3. The persons appointed shall sit for nine years and are only removable in cases where, in accordance with the law of their respective countries, judges ordinarily irremovable may have their appointment ended.

5. In full sessions of the Court at least a fourth of the appointed members must be present.

In order to insure the possibility of this, the members appointed shall be divided into three groups, in the alphabetical order of the signatures of the Convention.

The Judges arranged in each of these groups, shall sit, in accordance with a roster, for three years, during which they shall be bound to reside in a place from which they can arrive at The Hague in twenty-four hours after the receipt of a telegraphic summons.

All the members of the Court, however, are entitled, should they so wish, to sit at any time in full sessions, even though they do not belong to the group which is specially summoned.

(*Actes et documents*, 1907, Vol. II, pp. 620, 1047.)

(6) On Sept. 5th, 1907, Mr. Choate delivered a discourse to the Comite d'Examen in which, among other things, he summarised some of the schemes for the constitution of the Court which had been proposed as alternatives to the scheme jointly formulated by Germany, the United States and Great Britain. In this connection he said:

> As was expected, a very interesting counter-scheme was proposed based upon the alleged equality not only in sovereignty but in all other respects of all the States. It proposed to abolish the existing court, and for a new court to be constituted consisting of forty-five judges, one to be appointed by each State, and these to be divided into groups in alphabetical order of fifteen each, which were to sit for alternate periods of three years. This scheme was offered as an illustration of what was possible, based upon a recognition of the absolute equality of all States. Two objections to it were suggested,—first, that an allotment of periods by alphabetical order was really the creation of a court

by chance, and, second, that it deprived each nation of any hand or voice in the court for six years out of the nine.

(7) On 18 Sept., 1907, when the difficulty of obtaining an agreement concerning the constitution of the proposed Judicial Arbitration Court was threatening the project with the failure which ultimately befell it, Mr. Choate made the following "Proposition relative to the composition of the Court of Arbitral Justice":

(I) Each Signatory Power shall have the right of nominating a Judge or a Deputy-Judge, qualified, and willing, to accept these posts, and may transmit the names to the international Bureau.

(II) The Bureau shall thereupon draw up a list of all the nominated persons, indicating the nations which have nominated them, and shall transmit it to all the Signatory Powers.

(III) Each Signatory Power shall indicate to the Bureau which of the persons so nominated it chooses as judges and deputy-judges, each nation voting for fifteen judges and deputy-judges at the same time.

(IV) When the Bureau has received the voting-list it shall draw up a list of the fifteen persons who have received the greatest number of votes as judges and deputy-judges.

(V) In case of equality of votes in the selection of the fifteen judges and fifteen deputy-judges, the decision shall be by lot drawn by the Bureau.

(VI) In case of a vacancy arising in the post of judge or deputy-judge, the vacancy shall be filled by the State which proposed the judge or deputy-judge whose seat is vacant."

(*Actes et documents,* 1907, Vol. II, pp. 698-9).

B.—Apart from the abortive attempt to create a Court of international Justice, the Hague Conference of 1907 agreed on a Convention (No. 1 of that year) relative to the pacific settlement of international disputes. The Articles of that Convention which provide for the mode of constituting the court are as follows:—

44. Each Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator.

The persons thus selected are inscribed, as Members of the Court, in a list which shall be notified to all the Contracting Powers by the Bureau.

Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Contracting Powers.

Two or more Powers may agree on the selection in common of one or more Members.

The same person may be selected by different Powers.

The Members of the Court are appointed for a term of six years. Their appointments can be renewed.

Should a Member of the Court die or resign, the same procedure is followed in filling the vacancy as was followed in appointing him. In this case the appointment is made for a fresh period of six years.

(45) When the Contracting Powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen between them, the Arbitrators called upon to form the Tribunal to decide this difference must be chosen from the general list of Members of the Court.

Failing the composition of the Arbitration Tribunal by agreement between the parties, the following course shall be pursued:

Each party appoints two Arbitrators, of whom one only can be its national and chosen from among the persons selected by it as Members of the Permanent Court. These Arbitrators together choose an Umpire.

> The proviso as to the nationality of the Arbitrators was not in the corresponding Art. of 1899. For history of its origin and insertion in 1907, see *Actes et documents,* 1907, Vol. II, pp. 735-6.
>
> Lammasch proposed:—
>
> "No judge who is a national of one of the parties shall be appointed if the Tribunal is composed of only three members. "This was opposed by France and Great Britain, and negatived, *ibid.,* p. 741."

If the votes are equally divided, the choice of an Umpire is entrusted to a third Power, selected by agreement between the parties.

If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of Members of the Permanent Court, exclusive of the Members selected by the parties and not being nationals of either of them. Which of the candidates thus presented shall be Umpire is determined by lot.

C.—The Hague Conference of 1907 dealt also with the establishment of an International Prize Court, the result being embodied in Convention XII. As regards the composition of the Court the Conference had before it proposals made by Germany and by Great Britain. The German proposal in this particular was as follows:—

4. The International Prize Court shall be composed of five members—two admirals and three members of the Permanent Hague Court. Within two months of the commencement of hostilities, each belligerent must appoint an admiral and address itself, in addition, to a neutral Power so that this last-named Power may within the two following weeks choose another member among the members of the Arbitration Court whom it has appointed. Within two more weeks the two neutral Powers shall address themselves jointly to a third neutral Power so that this last named Power may within the two following weeks choose the fifth member among the members of the Arbitration Court whom it has appointed.

7. The Prize Court shall elect its President by an absolute majority of votes among those of its members who are part of the permanent Hague Arbitration Court. In case of need there shall be a ballot.

(*Actes et documents,* Vol. II, p. 1071.)

The British delegation proposed the following method of constituting the Court:—

4. Each of the Signatory Powers whose merchant marine, at the time of signature of the present Convention, exceeds a total of 800,000 tons shall, within three months following the ratification of the present Act, nominate a jurist of known competence in questions of International maritime-law and of the highest moral reputation and disposed to accept the functions of judge in this Court. Each Power shall also appoint a deputy-judge possessing the same qualifications.

5. The President of the Court shall be appointed by reference to the alphabetical order of the Powers which have nominated judges to the Court; he shall hold this office for a year to commence on the 1st January . . . The President who presides at the beginning of a suit shall continue to act until the close of the suit.

12. The Court shall comprise all the judges and shall sit *in pleno* with exception of the judges nominated by the disputant Powers.

In case of the absence of one of the members of the Court so composed, he shall be replaced by his deputy-judge.

(*Actes et documents,* Vol. II, p. 1076.)

The German and the British proposals were based on totally different principles, and in the issue certain elements were adopted from each, as will appear below. Arts. 10 to 14 of the Convention which was ultimately arrived at run as follows:—

10. The International Prize Court is composed of Judges and Deputy-Judges all of whom must be jurists of known profi-

ciency in questions of international maritime-law, and of the highest moral reputation.

The appointment of these Judges and Deputy Judges shall be made within six months after the ratification of the present Convention.

11. The Judges and Deputy-Judges are appointed for a period of six years, reckoned from the date on which the notification of their appointment is received by the Administrative Council established for the Pacific Settlement of International Disputes of the 29th July, 1899. Their appointments can be renewed.

Should one of the Judges or Deputy-Judges die or resign, the same procedure is followed in filling the vacancy as was followed in appointing him. In this case, the appointment is made for a fresh period of six years.

12. The Judges of the International Prize Court are all equal in rank and have precedence according to the date on which the notification of their appointment was received (Art. 11, para. 1), and if they sit by rota (Art. 15, para. 2), according to the date on which they entered on their duties. When the date is the same, the senior in age takes precedence.

The Deputy Judges when acting are in the same position as the Judges. They rank, however, after them.

14. The Court is composed of fifteen Judges; nine Judges constitute a quorum.

A Judge who is absent or prevented from sitting is replaced by the Deputy-Judge.

There was little difficulty in reaching an agreement on the Arts. named so far; but how were the fifteen judges to be obtained? Neither the German nor the British scheme was followed. According to the ultimate agreement the Court which, as proposed by Great Britain, was to be a permanent one, was to be composed of members provided by the great Powers, lesser Powers contributing in proportions settled by an annexed table (Art. 15, below). The German proposal provided for the representation of the belligerent captor, and the Convention adopts this proposal in Art. 16. The German proposal for the presence of a naval officer is adopted in Art. 18. Arts. 15 to 19 are as follows:—

15. The Judges appointed by the following Contracting Powers: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan and Russia, are always summoned to sit.

The Judges and Deputy Judges appointed by the other Contracting Powers sit by rota as shown in the Table annexed to the present Convention; their duties may be performed successively by the same persons. The same Judge may be appointed by several of the said Powers.

16. If a belligerent Power has, according to the rota, no Judge sitting in the Court, it may ask that the Judge appointed by it shall take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the Judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the Judge appointed by the other belligerent.

17. No Judge can sit who has been a party, in any way whatever, to the sentence pronounced by the National Courts, or has taken part in the case as counsel or advocate for one of the parties.

No Judge or Deputy-Judge can, during his tenure of office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever.

18. The belligerent captor is entitled to appoint a naval officer of high rank to sit as Assessor, but with no voice in the decision. A neutral Power, which is a party to the proceedings or whose national is a party, has the same right of appointment; if in applying this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

19. The Court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

The adoption of Art. 15 was not effected without prolonged and strenuous objections on the part of the smaller states. Their case was championed by M. Ruy de Barbosa (Brazil); he fought the principle of Art. 15 throughout and recorded the only vote given against the draft Convention at the sixth Plenary meeting of the Conference. Brazil did not sign the Convention, and the following states, when signing, made reservations with regard to Art. 15; Chile, Cuba, Ecuador, Guatemala, Hayti, Persia, Salvador, Siam, Turkey and Uruguay.

# METHODS OF CONSTITUTING A PERMANENT TRIBUNAL OR A COURT OF INTERNATIONAL JUSTICE, CONTAINED IN OFFICIAL PROJECTS OF VARIOUS GOVERNMENTS

## Projects Antedating the Peace Conference of Paris

### *Convention of December 20, 1907, relating to the creation of a Court of International Justice of Central America*[5]

#### Article 6

The Court of Justice of Central America shall be composed of 5 judges, one of whom shall be appointed by each of the Republics, and who shall be chosen from among the jurisconsults possessing the qualifications prescribed by the law of each of the countries for the exercise of the high magistracies and enjoying the highest reputation both from the moral point of view and from the professional point of view.

Vacancies shall be filled by the deputy judges designated at the same time and in the same manner as the judges, and possessing the same qualifications as the latter.

The presence of the 5 judges constituting the tribunal is necessary to constitute the legal quorum required for the decisions of the Court.

#### Article 7

The legislative power of each of the 5 contracting Republics shall designate its respective judges, namely, one judge and two deputy judges. The compensation of each judge shall be 8,000 pesos in American gold per annum, and shall be paid to him by the Treasury of the Court. The compensation of the judge of the country in which the Court has its seat shall be fixed by the Government of this country. Furthermore each State shall furnish an annual contribution of 2,000 pesos to cover the ordinary and extraordinary expenses of the Tribunal.

The Governments of the contracting Republics undertake to include their respective quotas in their budgets and to pay in advance, every three months, to the Treasury of the Court, the sum incumbent upon them for these services.

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[5] Translation. For the French text, see Secretariat of the League of Nations, *Mémorandum sur les différentes questions concernant l'établissement de la Cour Permanente de Justice Internationale présenté à la Commission de Juristes chargée de préparer le projet relative à l'établissement de cette cour,* Annexes Nos. 1-4, pp. 16, 17.

ARTICLE 8

The judges and the deputy judges shall be named for a period of 5 years beginning from the day upon which they shall enter upon their functions. They shall be eligible for reelection.

In case of death, resignation or permanent incapacity of any judge, the interested legislative Power shall provide for his replacement and the judge designated shall complete the period of activity of his predecessor.

ARTICLE 13

The Court of Justice of Central America represents the national conscience of Central America and, in this capacity, the judges composing the Tribunal shall not consider themselves as hindered in the exercise of their functions by the interest which the Republic to which they owe their nomination may have in any case or question whatsoever. With regard to calling in question or challenging, the rules of procedure which the Court will adopt shall be authoritative.

*Treaty between the United States and France for the Advancement of General Peace, signed September 15, 1914* [6]

ARTICLE 2

The International Commission shall be composed of five members appointed as follows: Each Government shall designate two members, only one of whom shall be of its own nationality; the fifth member shall be designated by common consent and shall not belong to any of the nationalities already represented on the Commission; he shall perform the duties of President.

In case the two Governments should be unable to agree on the choice of the fifth commissioner, the other four shall be called upon to designate him, and failing an understanding between them, the provisions of Article 45 of the Hague Convention of 1907 shall be applied.

The Commission shall be organized within six months from the exchange of ratifications of the present convention.

The members shall be appointed for one year and their appointment may be renewed. They shall remain in office until superseded or reappointed, or until the work on which they are engaged at the time their office expires is completed.

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[6] *Treaties for the Advancement of Peace between the United States and Other Powers, Negotiated by the Honorable William J. Bryan, Secretary of State of the United States* (Carnegie Endowment for International Peace, 1920), p. 35.

Any vacancies which may arise (from death, resignation, or cases of physical or moral incapacity) shall be filled within the shortest possible period in the manner followed for the original appointment.

The High Contracting Parties shall, before designating the Commissioners, reach an understanding in regard to their compensation. They shall bear by halves the expenses incident to the meeting of the Commission.

### *A Swiss Project of a Federal Pact of the League of Nations and a Constitution of the League of Nations, November, 1918–January, 1919*[7]

#### B. The International Court of Justice

Art. 12. There is established an International Court of Justice accessible at all times to the contracting parties.

Art. 13. The International Court of Justice is named by the Conference of the States for a period of 9 years. Each State proposes at least one and at most four candidates duly qualified, disposed to accept the functions of judge and of whom at least one shall not be a ressortissant of the said State. Each State then designates 15 persons taken from the list thus composed. The 15 candidates who have acquired the largest number of votes are elected. In case of withdrawal or of death of the elected persons, or when, as a result of challenging, the number of judges falls below 15, the others enter upon the functions in the order of the votes that they have received.

Art. 14. The 7 judges who have received the largest number of votes constitute the Bureau of the Court; these 7 judges appoint from their own midst, for a period of 3 years, a President, a first Vice President and a second Vice President. The 4 other members act, as deputies, in the order of their election. The President of the Bureau also presides over the plenary sessions of the Court.

Art. 15. The International Court of Justice renders judgment in plenary session only in the cases expressly provided or when the case involves the internal administration of the Court. It is composed of 5 judges when it renders judgment ordinarily upon disputes which have been submitted to it.

When a dispute is pending before the Court, each party must, within a period of four weeks, challenge 5 judges. If a party allows

[7] Translation of official French text published by the Secretariat of the League of Nations.

this period to pass without proceeding to this challenge, the 5 judges whom it should have challenged are designated by lot; the same manner of procedure is followed when the challenging of the two parties has involved less than 10 judges.

If the parties renounce their right of challenge, the Court is formed of the 5 judges elected by the largest number of votes. Those of them who may have been prevented or may be on leave shall be replaced by the judges who have obtained, after them, the largest number of votes.

The judges who are ressortissants of a State which is a party, or who are in its service, or who are established upon its territory, are challenged. In case the Court, according to Article 37, is competent because the parties have not been able to come to an agreement in due time as to the composition of a tribunal of arbitration, each party has the right to designate any member of the Court who cannot be challenged by the adverse party.

The 5 judges who have not been challenged elect the President from their midst.

ART. 16. The Seat of the International Court of Justice is fixed by the Conference of the States. The latter draws up the general rules of procedure to be followed before it. The Court makes it own rules.

## RECENT PROJECTS, SUBMITTED TO THE PEACE CONFERENCE AT PARIS

### *Project of the United States, submitted to the Commission of the League of Nations, Paris Peace Conference of 1919*[8]

#### EXTRACT FROM ARTICLE 5

In case of arbitration, the matter or matters at issue shall be referred to arbitrators, one of whom shall be selected by each of the parties to the dispute from outside their own nationals, when there are but two such parties, and a third by the two thus selected. When there are more than two parties to the dispute, one arbitrator shall be named by each of the several parties and the arbitrators thus named shall add to their number others of their own choice, the number thus added to be limited to the number which will suffice to give a deciding vote to the arbitrators thus added in case of a division among the arbitrators chosen by the contending parties. In case the arbitrators chosen by the contending parties cannot agree upon an additional arbitrator or

[8] U. S. Senate Document No. 106, 66th Cong., 1st sess., p. 256.

arbitrators, the additional arbitrator or arbitrators shall be chosen by the Executive Council.

On the appeal of a party to the dispute the decision of said arbitrators may be set aside by a vote of three-fourths of the Delegates, in case the decision of the arbitrators was unanimous, or by a vote of two-thirds of the Delegates in case the decision of the arbitrators was not unanimous, but unless thus set aside shall be finally binding and conclusive.

When any decision of arbitrators shall have been thus set aside, the dispute shall again be submitted to arbitrators chosen as heretofore provided, none of whom shall, however, have previously acted as arbitrators in the dispute in question, and the decision of the arbitrators rendered in this second arbitration shall be finally binding and conclusive without right of appeal.

*An extract relating to the Court from the Draft Project for the Constitution of a Society of Nations, presented to the Preliminary Peace Conference at Paris by the Italian Government*[9]

CHAPTER II—*International Court of Justice*

ARTICLE 18

An "International Court of Justice," composed of judges named by all the contracting States, is established at The Hague. Each State appoints one judge. The nomination is made for six years and may always be renewed.

ARTICLE 19

Every two years the Court elects from among its own members a president and a vice president. The election takes place by a majority of the votes and by a secret ballot; in case of an equality of votes after two ballots, the oldest person is considered as elected.

ARTICLE 21

The Court functions by forming a section to judge each case. Each section comprises:

(1) The President of the Court, or in case of prevention, the Vice President;

(2) A judge chosen by each of the litigant parties from among the members of the Court;

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[9] Translation. For a French translation of Italian text, see *Mémorandum* of the Secretariat of the League of Nations, Annexes Nos. 1-4, pp. 2, 3.

(3) Four judges elected by secret ballot by the Court from among its members. Each member votes for two names, and those who have obtained the majority of the votes are elected. If, however, being given the number of the parties, it happens that the section is composed of an equal number of members, the Court shall elect five judges and each member shall vote for three names. In case of equality of votes, the oldest person is considered as elected.

If one of the parties does not designate its judge, the Court shall likewise elect him by secret ballot and by special vote.

ARTICLE 24

The constitution of the section can not be modified while the case for the judgment of which it has been constituted is pending. Whenever one of the judges is missing, he is replaced by another judge chosen by the parties or elected by the Court, according to the method of nomination of the judge whom he replaces. The vacancy shall be filled within the shortest possible period and in every case at latest within the thirty days following its notification.

*An extract relating to the Court from the Project for the Creation of a Society of Nations, presented May 9, 1919, to the President of the Peace Conference at Paris by the German Delegation* [10]

C. THE PERMANENT COURT OF INTERNATIONAL JUSTICE

ARTICLE 14

The Court of International Justice shall be constituted by the Congress of States, for a period of nine years, as follows:

Each State proposes at least one and at most four persons fitted and inclined to exercise the functions of judge.

At least one of the persons proposed shall not be a ressortissant of the proposing State.

From the general list of proposals each State designates 15 persons; the 15 persons who receive the greatest number of votes are chosen as judges.

The judges, in case of vacancy, are replaced by those persons who received the greatest number of votes after the 15 persons elected, and in the order of the number of votes received.

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[10] Translation. For the French text, see *Mémorandum* of the Secretariat of the League of Nations, Annexes Nos. 1-4, p. 6.

ARTICLE 15

The award is rendered by a tribunal of three members, one of whom is chosen by each of the parties. The President is named by all the members of the Court, in case the parties can not reach an agreement as to appointing him.

*Annexes A and B to the Note of June 23, 1919, of the Austrian Delegation to the Peace Conference at Paris, relative to the Society of Nations* [11]

ANNEX A, ARTICLE 13

The International Tribunal is composed of fifteen judges and of eight deputy judges elected in plenary session of the Members of the League. Those are considered as being elected who have obtained the largest number of votes. No State can have more than one member. The Tribunal reaches its decisions in Commissions of nine members, each of the parties challenging three.

A Commission of the Tribunal of three members shall decide the preliminary question as to whether the objection regarding vital interests is well founded or not. This Commission shall be formed by the parties each challenging six members.

In case the Commission decides that the dispute affects the vital interests of one of the parties, the case shall pass before the Court of Arbitration.

The Court of Arbitration is formed on the model of the Convention of 1907 for the composition of the Court at The Hague. In any case the decisions shall be taken by a commission of five members, the parties each having the right to exclude the ressortissants of —— states. If, in the course of one month, the parties can not come to an agreement upon the election of a president, the latter shall be elected by a permanent commission of nineteen members, to be elected at the opening of each session, and of whom each party shall challenge eight members.

The decisions of the International Tribunal and of the Court of Arbitration are definitive. They bind the parties to execute them in good faith and oblige the Members of the League to concur in their execution by virtue of the provisions of the Covenant.

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[11] Translation. For the French text, see *Mémorandum* of the Secretariat of the League of Nations, Annexes Nos. 1-4, pp. 10, 11.

ANNEX B

All disputes susceptible of a solution according to general principles, will be submitted for a judicial decision. But this decision may be either a solution similar to those arrived at by national tribunals, a decision of a standing tribunal, created by the will of the League of Nations by means of the election of persons who enjoy the confidence of the majority of states—or a decision of an arbitral character rendered by an arbitral Court set up by the parties to the dispute. Generally speaking the first method seems preferable. This course is indicated with specially forcible logic by the United States of America, where the Society for the Judicial Settlement of International Disputes has, since 1910, shown very great activity in support of the establishment of a permanent tribunal analogous to their Supreme Court. All the delicate matters which are the unavoidable consequence of the difficulty of constituting an arbitral tribunal would be avoided. This permanent tribunal would be able to create a solid basis for the law of nations and thus give the parties to the dispute the assurance that the decision would be in conformity with the principles of law. The principal advantage of such a permanent tribunal would be to offer as far as possible in human affairs an almost absolute guarantee for the impartiality of its verdicts. This guarantee will be based on the following rules:—

(1) The judges will be elected for a number of years fixed in advance, not for a special case, so that their opinion on the particular case shall not be known beforehand.

(2) Only persons enjoying the full confidence of the majority of the States which have instituted the tribunal can act as judges;

(3) The ressortissants of the parties to the dispute will be excluded from rendering decisions in special cases;

(4) Each party will be entitled to eliminate three judges from among the fifteen who compose the tribunal without being obliged to cite a reason for this elimination.

However suitable a similar tribunal might be in the majority of cases of a legal nature, one cannot deny that for certain categories of disputes States will have confidence only in tribunals formed for each special case, in the composition of which they have had some influence. These are cases in which the vital interests of one of the parties are at stake. For these cases our proposal grants to each party the right to demand an arbitral court instead of the permanent tribunal.

Evidently it can not suffice that a party should make an objection in this sense in order to dispossess the permanent tribunal of jurisdic-

tion. To obtain this result, this objection will have to be recognized as being well founded by a Commission whose impartiality can not be suspected. With this object, the project proposes to create a commission, for the election of which each party shall challenge 6 members of the whole 15. In case this commission decides that the dispute affects the vital interest of one of the parties, the case will pass before the Court of Arbitration. In the contrary case, it shall remain submitted to the International Tribunal.

The Court of Arbitration shall be composed upon the model of the Hague Court of 1907. It shall decide by a commission of five members. In order to better insure the impartiality of these commissions, they shall be composed in a manner which differs slightly from that provided for the Court of Arbitration of The Hague.

In order to judge the individual case, each of the litigant parties shall name two members who shall not be its ressortissants. The adverse party shall have the right of excluding the ressortissants of a definite number of States. The number of these exclusions shall differ according as the number of States having established the Court shall be larger or smaller. Special attention shall be given to the choice of the president. At the opening of each session a permanent commission of 19 members shall be elected. For the election of the president each party shall eliminate 8 members of this Commission, so that there will remain 3 members who will choose the president from among all the members of the Court.

## Recent Projects, not submitted to the Peace Conference at Paris

### *Draft Convention for an International Juridical Organization, prepared by the three committees appointed by the Governments of Denmark, Norway and Sweden, respectively, February, 1919* [12]

#### II.—Court of International Justice

10. The organization of the Court shall as far as possible be based upon the principle of the legal equality of the States.

11. The Court of Justice is com-

[12] Translation. For original French text, see *Avant-projet de convention relative à une organisation juridique internationale élaboré par les trois comités nommés par les Gouvernements du Suède, du Danemark et de Norvège, avec un exposé des motifs extrait du Rapport du Comité suédois* (Stockholm, 1919), p. 2.

posed of *15 members* chosen from among persons enjoying the highest moral reputation and all of whom must fulfil the conditions required in their respective countries for admission to the high magistracy, or be jurisconsults of a known competence in matters of international law. The members are chosen without regard to their nationality; *however, more than two members who are nationals of one and the same State shall not sit at the same time.*

Danish alternative: 27 members.

Alternative: however, all the members must belong to different States.

12. The members of the Court of Justice are elected by an Electoral Assembly in which each State is represented by the first in numerical order of its judges in the Permanent Court of Arbitration at The Hague, or if this member is prevented, by the next member who is not prevented.

*The members are appointed for life.*

Alternative: The elections take place, with the exception mentioned in the third paragraph, for a period of 9 years. The mandates may be renewed. The members of the Court of Justice complete the cases which have been submitted to them, even in case the period for which they were named judges may have expired.

After the first election the judges are distributed by drawing of lots in three equal groups having a varying duration of mandates, in such a way that the future elections be concerned in every case only with the renewal of one-third of the members of the Court.

13. The election is based upon a list comprising all the candidates proposed by the Governments. Each Government presents at most as many candidates as there are places to be filled in each particular case, and at least one-half of this number. No independent proposal may be formulated within the Electoral Assembly.

14. The Electoral Assembly meets at The Hague for the first time on June 1, . . . , or upon the following week day and thereafter at the same time *every 6 years*. Before the meeting of the Electoral Assembly the International Bureau of the Administrative Council of the present Permanent Court of Arbitration convokes in due time the first member of each State in numerical order.

Alternative: every 3 years.

15. The Electoral Assembly elects its own President.

16. Before the election of the members of the Court, a deliberation must take place among all the electors present.

Only the electors present have the right of vote.

The election takes place for one member at a time.

In order to be elected a member of the Court, the candidate must have obtained an absolute majority of the votes cast. If after two ballots no candidate has obtained an absolute majority, the election shall take place in the third ballot by a simple majority.

17. Beside the members of the

International Court of Justice there shall likewise be 15 deputy members *elected for a period of 6 years.* They shall be elected in the same manner as the ordinary members. At the time of their election the Electoral Assembly likewise fixes the order of the deputy members. When an ordinary member ceases to be a member of the Court, he is replaced, according to the fixed order, by the first deputy, who takes the place of the departing member *for life.*

Alternative: whose mandates expire at the time of the meeting of the Electoral Assembly.

When in other cases the Court is obliged to call deputies, they enter into function in the order fixed at the time of their election and remain in office as long as necessary.

Alternative: for the remainder of the duration of the mandate.

If as a result of the rule prescribing that more *than 2 members* belonging to the same State can not sit in the Court, a deputy is prevented, his place shall be taken by the person who follows him immediately in the list of deputies.

Alternative: than one member.

*A Project for a Court of International Justice, prepared by the Committee appointed by the Danish Government, August, 1919*[13]

ARTICLE 1

The Court is composed of 21 members chosen from among persons enjoying the highest moral reputation and all of whom must fulfil the conditions required in their respective countries for admission to the high magistracy, or be jurisconsults of a known competence in matters of international law. The members are elected without regard to their nationality; however, more than two members who are nationals of one and the same Power shall not sit at the same time.

[13] Translation of the official French text published by the Secretariat of the League of Nations.

ARTICLE 2

The members of the Court are elected by the Assembly. The elections take place every three years.

ARTICLE 3

The election is based upon a list comprising the candidates proposed by the Governments. Each Government presents at most as many candidates as there are places to be filled in each particular case, and at least one-half of this number. At most one-third of the candidates proposed may belong to the Power in question.

No independent proposal may be formulated within the Assembly.

ARTICLE 4

A general deliberation takes place before the election.

ARTICLE 5

In order to be elected a member of the Court, the candidate must have obtained an absolute majority of the votes cast.

If after three ballots there still remain mandates to be distributed, the voting continues by submitting each undistributed mandate to a special vote. If in this case, after two ballots, no candidate has obtained an absolute majority, the election is decided by a third ballot between the two candidates who, in the second ballot, obtained the plurality of the votes.

ARTICLE 6

There shall likewise be 15 deputy members who are elected in the same manner as the ordinary members of the Court and for the same period. At the time of their election the order of the deputy members is likewise fixed.

If as a result of the rule prescribing that more than two members belonging to the same Power can not sit in the Court, a deputy member is prevented, his place shall be taken by the person who follows him immediately in the order of the deputies.

ARTICLE 7

The election takes place for a period of 9 years. A judge whose period may have expired, participates none the less in the settlement of a case, the examination of which he has begun.

When a judge has died or has for any other reason ceased to be a member of the Court, he is replaced by the deputy, who takes his place

for the remainder of the duration of the mandate of the departing member.

After the first election the judges are distributed, by drawing of lots, in three equal groups having a varying duration of mandates, in such a way that the future elections be concerned in every case only with the renewal of one-third of the members of the Court.

The mandates may be renewed.

*Report prepared by the Committee appointed by the Norwegian Government for investigating certain questions relating to the Society of Nations, August, 1919*[14]

ART. 1.—The Court of International Justice is composed of *21 members* chosen from among persons enjoying the highest moral reputation and all of whom must fulfil the conditions required in their respective countries for admission to the high magistracy, or be jurisconsults of a known competence in matters of international law. The persons are chosen without regard to their nationality; however, more than two judges who are ressortissants of one and the same Power shall not sit at the same time.

Mr. Lange: 15 members.

ART. 2.—The members of the Court are elected by the Assembly of the League of Nations.

The elections take place every 3 years.

ART. 3.—The election is based upon a list comprising all the candidates proposed by the Governments. Each Government presents so many candidates as there are

[14] Translation of the official French text published by the Secretariat of the League of Nations.

mandates to be conferred within the Court in each particular case.

*A Power can designate at most, at the first election, only one-third of the candidates whom it proposes, from among its own ressortissants; and, at the subsequent elections, three at most.*

Messrs. Grieg and Lange: A Power can designate at most only one-third of the candidates whom it proposes, from among its own ressortissants.

No independent proposal may be formulated within the Assembly.

ART. 4.—Before the election, a general deliberation must take place.

ART. 5.—In order to be declared elected a member of the Court, the candidate must have obtained an absolute majority of the votes.

If after three ballots there still remain mandates to be conferred, the balloting is continued in the following manner: the election takes place for one mandate at a time. If after two ballots for one of these mandates, no candidate has obtained an absolute majority, the election shall take place in a third ballot between the two candidates having obtained the greatest number of votes in the second ballot.

ART. 6.—Furthermore, there shall be 15 deputy judges. They are elected in the same manner and for the same period as the members of the Court. Compare Articles 3 and 5. The order of the deputies is fixed at the time of their election.

Messrs. Grieg and Lange: Furthermore, there shall be 15 deputy judges elected for 3 years according to the rules fixed for the election of the members of the Court.

If as a result of the rule prescribing that more than 2 ressortis-

sants of one and the same Power can not sit in the Court, a deputy is prevented, his place is taken by the person who follows him immediately in the list of deputies.

ART. 7.—*The elections take place for a period of 9 years. The members complete the cases which have been submitted to them, even if the period for which they have been elected has expired.*

When a judge dies or ceases his functions for other reasons, he is replaced by the first deputy, who takes his place until the next election.

*At the time of the first election the judges are distributed, by drawing of lots, in three equal groups, having a varying duration of mandates, in such a way that the future elections be concerned in every case only with one-third of the members of the Court.*

*The members of the Court are eligible for reelection.*

Messrs. Grieg and Lange: The members of the Court are named for life.

When a judge . . ., the next election.

Mr. Lange: A member of the Court may be removed whenever he must be considered as being incapable of fulfilling his functions. A decision on this subject is taken either by the Court or by the Assembly. If it is taken by the Court, it must secure a unanimous vote, if it is taken by the Assembly, three-fourths of the votes of the Powers represented.

*Swedish Project for a Convention relating to a Permanent Court of International Justice, August, 1919*[15]

1

The Court of International Justice provided for by Article 14 of the Covenant of the League of Nations is composed of 15 members chosen from among persons enjoying the highest moral reputation and all of whom shall fulfil the conditions required in their respective countries for the admission to the high magistracy, or be jurisconsults of a known competence in matters of international law. The members

[15] Translation of official French text published by the Secretariat of the League of Nations.

are chosen without regard to their nationality; however, more than two judges who are nationals of one and the same State shall not belong to the court.

2

The members of the Court of Justice are elected by an Electoral Assembly in which each member of the League of Nations is represented by the first in numerical order of its judges in the Permanent Court of Arbitration at The Hague, or, in his absence, by the next member who is not prevented.

The judges to the Court are appointed for life.

3

The right of nomination belongs to the Government of each of the States which are members of the League of Nations. Each Government presents at most so many candidates as there are mandates to be provided for and at least one-half of this number. No nomination of candidates shall be admitted in the Electoral Assembly.

4

The Electoral Assembly meets at The Hague for the first time on . . . and thereafter at the same time every six years. The International Bureau of the Administrative Council of the present Permanent Court of Arbitration advises in due time the first members of the different States in numerical order of the meeting of the Assembly.

5

The Electoral Assembly elects its own President.

6

Before the election of the members of the Court a deliberation shall take place among all the electors present.

The electors present only have the right of vote.

The election takes place for one member at a time.

In order to be elected a member of the Court, the candidate must have obtained an absolute majority of the votes cast. If after two ballots no candidate has obtained an absolute majority, the election shall take place in the third ballot by a simple majority of the votes.

7

Beside the members of the International Court of Justice there shall likewise be 15 deputy members, elected for a period of 6 years.

They shall be elected under the same conditions as the ordinary members. At the time of their election, the Electoral Assembly shall likewise fix a numerical order for the deputy members. When an ordinary member ceases to belong to the Court, the first in numerical order of the deputy members replaces him in his functions for life.

In any other case in which the Court must call upon deputies to sit, they enter upon their functions in the order fixed at the time of their election and remain in office as long as necessary.

If by virtue of the provision prescribing that not more than two members who are nationals of one and the same State shall belong to the Court, a deputy is prevented, he shall be replaced by the person who follows him immediately in the list of deputies.

## *Netherland Project relating to the Establishment of the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations, end of 1919*[16]

### Title 1.—*The Organization of the Permanent Court of International Justice*

#### Article 1

The Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations is composed of permanent and professional judges, in order to assure the continuity of international jurisprudence.

#### Article 2

(1) The Court is composed of 7 judges and 5 deputy judges of different nationality.

(2) The judges and deputy judges are taken from among persons enjoying the highest moral reputation and all of whom must fulfil the conditions required in their respective countries for admission to the high magistracy, either administrative or judicial, or be jurisconsults of a known competence in matters of international law.

(3) They are named by the Administrative Council mentioned in Article 17, and by means of national lists of recommendation, in the manner foreseen in Articles 3 and 4.

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[16] Translation of official French text published by the Secretariat of the League of Nations.

ARTICLE 3

(1) The national lists of recommendation are composed on the one hand, by the colleges which in each country are charged with the highest jurisdiction, either administrative or judicial, and on the other hand, by the faculties of law of the national universities, with the reservation of the right of the Governments, as mentioned below, to complete the general list.

(2) The Secretariat of the League of Nations fixes the day of the election.

(3) At least four months before this day the Secretariat invites by telegram the colleges and faculties mentioned in the first paragraph to present to it within a period of two months a recommendation of two persons at the most answering the conditions of Article 2, paragraph 2. The invitations may be addressed through the Governments. The recommendations received after the expiration of the said period of two months are void.

(4) At least six weeks before the day of the election the Secretariat publishes in a general list the recommendations in alphabetical order, mentioning the number of recommendations acquired by each of the candidates but without mentioning the recommenders.

(5) Within the three weeks which follow this publication, each Government may modify the general list, on the one hand, by the addition of the names of two new candidates answering the conditions of Article 2, paragraph 2, on the other hand, by augmenting with another recommendation the number of recommendations of two persons whose names are already found upon the list.

(6) At least three weeks before the day of the election the Secretariat publishes the general list modified in this way, while observing the provisions of paragraph 4.

(7) The Secretariat convokes the Administrative Council to the election.

ARTICLE 4

(1) The election is made exclusively from among the persons found on the last general list, provided with at least three recommendations.

(2) At the election, the representative of.....disposes of..... votes; etc.

(3) The election is made by a list ballot. Those persons who acquire the largest number of votes are considered as elected, provided that this number is not less than one-fourth of the votes cast. The

seven persons elected by the largest number of votes are judges; the next five persons are deputy judges. If several persons who have been elected acquire the same number of votes and the number of places is less than that of the persons elected, a decision is reached by lot. If there are among those elected, persons of the same nationality, the person who has acquired the largest number of votes is considered as elected; if the number of votes is equal, the decision is reached by lot. The same rule applies in case there should be two persons elected having the number of votes required for the last place as judge.

(4) The Secretariat publishes the result of the election as soon as possible.

ARTICLE 5

(1) The judges and deputy judges are named for a period of 12 years. Their mandate may be renewed.

(2) In case of death or resignation of a judge or deputy judge provision is made for filling his place in accordance with the manner fixed for his appointment. In this case the appointment is made for a fresh period of 12 years.

(3) During the period of their functions they may be recalled or suspended only by virtue of a decision of the Court itself.

ARTICLE 17

(1) The Permanent Administrative Council, composed of representatives of the members of the League of Nations at . . . . . [17] and of the Minister of Foreign Affairs of . . . . . ,[18] who fulfills the functions of President, has charge of the administration and the control of the International Bureau.

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[17] Seat of the Court.

[18] Country in which the Court sits.

*Project of the Hague Conference of February 16-27, 1920, concerning the establishment of the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations, drafted by official representatives of Denmark, Norway, Holland, Sweden and Switzerland*[19]

CHAPTER II.—*Organization of the Court*

ARTICLE 4

1. The Court shall be composed of fifteen judges and six deputy judges, selected from persons of the highest character, who shall possess the qualifications required, in their own countries, for elevation to high legal office whether administrative or juridical, or shall be jurisconsults of recognized authority in international law.

2. *Not more than two judges of the same nationality may belong to the Court.*

DANISH DELEGATION:

Only one judge of any one nationality may belong to the Court.

ARTICLE 5

1. The judges and deputy judges shall be appointed by the Assembly of the League of Nations.

ARTICLE 6

1. Whenever one or more judges are to be elected, the Secretariat of the League of Nations shall request the Members to send it a list of candidates within three months. Any nominations received after the expiration of this time shall not be considered.

[19] *Conférence de la Haye pour l'élaboration d'un projet relatif à l'établissement de la Cour Permanente de Justice Internationale, prévue à l'article 14 du pacte de la Société des Nations,* 16-27 février 1920 (The Hague, 1920), p. 5.

2. Each Member may nominate a number of candidates equal to the number of vacancies and not less than half the number; in no case less than three.

Not more than one-third of the candidates nominated may be subjects of the nominating State.

3. Before submitting their nominations, Members shall consult their respective High Courts of Justice and the legal faculties of their Universities.

4. The Secretariat shall have authority to request Members to amend their nominations, before the expiration of the period mentioned in paragraph 1, should such nominations not appear to conform to the conditions of paragraph 3.

5. The Secretariat shall publish a list stating the nominations in alphabetical order. This list shall show the number of nominations obtained by each candidate, but shall not show the names of the nominating Members.

6. At the meeting of the electoral Assembly, there shall be a discussion. After this discussion each voter shall vote for a number of candidates equal to the number of vacancies, the candidates to be chosen from the list referred to in paragraph 5. Votes shall be recorded in writing and by secret ballot.

7. If several judges are to be appointed at one time, election shall be by *scrutin de liste*. The candi-

dates obtaining an absolute majority shall be elected. Should, after three ballots, any vacancies remain unfilled, the following method of voting shall be adopted: one vacancy shall be voted for at a time. If after two ballots, no candidate shall have obtained an absolute majority, a third ballot shall be taken to decide between the two candidates who obtained most support at the second ballot. Should several candidates obtain the same number of votes or should the number of vacancies be less than the number of candidates elected, the eldest candidates shall be considered elected. Should more than two citizens of the same country be among those elected, the two obtaining the largest number of votes shall be considered as elected; if an equal number of votes be obtained, the eldest candidates shall be considered as elected.

8. If only a single judge is to be elected, the candidate receiving an absolute majority of votes shall be elected.

Should no candidate obtain an absolute majority after two votings a third vote shall be taken to decide between the two candidates obtaining most support at the second vote. In case of equality, the eldest candidate shall be considered elected.

9. The Secretariat shall publish the result of the election as soon as possible.

ARTICLE 7

1. Deputy judges shall be elected from the list in the manner provided for in Article 6.

2. If both judges and deputy judges are to be elected at the same time, the election of judges shall take place first.

ARTICLE 8

In case of the retirement, resignation, removal or death of a judge or deputy judge, a new election shall take place within twelve months.

ARTICLE 9

1. *Judges shall be appointed for a term of nine years;* deputy judges for six years.

2. They may be reappointed.

3. Judges or deputy judges shall complete the hearing and decision of cases of which they may have cognizance, even though the period for which they have been elected has expired.

SWEDISH AND NETHERLAND DELEGATIONS:

Judges shall be appointed for life.

## ROOT-PHILLIMORE PLAN FOR ORGANIZATION AND JURISDICTION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE [20]

1. The Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations shall consist of

[20] The Root-Phillimore Plan was laid before the Advisory Committee in two sections: the first part, Articles 1 to 17, inclusive, on June 30, and the second part, Articles 18 to 30, inclusive, on July 1.

Article 29 originally read: "The rest of the subject of competency is covered by the article drawn by the President and Lord Phillimore and amended by Mr. Ricci-Busatti."

In the text as printed, this material was inserted as Articles 29, 30 and 31, with the result that Article 30 of the original became Article 32 of the Root-Phillimore plan.

independent judges who shall be chosen regardless of their nationality and who shall possess the qualifications required, in their own countries, for elevation to high legal office whether administrative or judicial, or shall be jurisconsults of recognized authority in international law.

2. There shall be eleven judges and four supplementary judges who shall hold office for a term of nine years and who shall be elected by the Assembly and the Council of the Society of Nations. Each of those bodies shall vote separately and the votes of a majority of the members present and voting in each body shall be necessary to an election.

3. If, after the first vote in each electoral body, it shall appear that any vacancies in the Court remain unfilled, a second vote shall be taken in like manner to fill such vacancies; and separate votes shall be taken in like manner until all the existing vacancies are filled.

4. For the purpose of reconciling any differences which may arise between the two electoral bodies in regard to the persons to be elected, they may at any time when they deem it suitable appoint a committee composed of three from each body for the purpose of conferring and recommending the conciliation of such differences. If such differences should prove ultimately irreconcilable, the appointment to the vacancies unfilled shall devolve upon the judges who have already been agreed upon.

5. The supplementary judges shall be separately elected in like manner.

6. A list of persons qualified and fit to exercise the judicial office shall be laid before the Assembly and the Council respectively before the time of election. Such list shall be made up in the following manner: At least three months before the time of election, the Secretary-General of the League of Nations shall apply in writing to the members of the Permanent Court of Arbitration at The Hague from each country which shall have appointed such members, requesting the members from each country, acting as a body, to propose not more than four names of persons whom they deem to be qualified and available for judges.

7. All of the persons so proposed shall form the list to be laid before and considered by the Assembly and Council and the judges shall be elected from that list. In the event, however, of the Assembly and Council not agreeing, the Committee of Conference shall be at liberty to recommend to the Assembly and Council a person outside the list.

8. The members of the Permanent Court of Arbitration in each country are requested to consult with the highest judicial officers, the heads of universities and learned societies, to the end that the nominations made may be of persons who are the most competent and experienced and of the highest judicial character and reputation.

9. Judges or supplementary judges shall complete the hearing of cases of which they have cognizance even though the period for which they have been elected shall have expired.

10. In case any judge or supplementary judge shall become incapable or unfit for the performance of a judicial office, upon the unanimous representation of this fact by the court to the Secretary General the place of the judge shall become vacant and notice shall be given of an election to fill the vacancy at the next meeting of the Assembly and Council.

11. In all elections of judges and supplementary judges the electors shall be under honorable obligation to take into account the existence of the necessary qualifications and to seek so far as practicable to have represented in the Court the different forms of civilization and juridical systems which exist among the members of the Society of Nations; but, there shall be but one member of the Court elected from any one State.

12. The Court shall elect its own President and Vice-President. It shall also appoint its registrar or may designate the registrar of the Permanent Court of Arbitration to be its registrar.

13. The President and Vice-President shall be elected for a term of three years and shall be eligible for re-election.

14. A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties. A judge cannot act as agent or advocate in any international cause during his term of office.

15. Vacancies in the office of judge and supplementary judge shall be filled as in the case of original appointments, and in every case the appointment shall be for the full term of nine years.

16. The parties cannot challenge a judge of the Permanent Court of International Justice. If, for a specific reason, the President of the Court considers that one of the judges ought not to sit in a particular case, he shall so inform him and thereupon it becomes the duty of the judge to abstain from sitting. A judge who believes that he ought not to sit in a particular case can take the initiative with the President with

reference thereto. In case of disagreement on this point between the President and the judge it is competent for either to appeal to the Court in plenary session for a decision of the question.

17. The number of judges may be increased by the Assembly from time to time to not exceed fifteen judges and six supplementary judges in the aggregate.

18. Every judge or supplementary judge shall, at the first sitting at which he is to be present, solemnly declare that he will exercise his functions in accordance with international law.

19. The President shall reside at the seat of the Court.

20. The judges and supplementary judges shall enjoy diplomatic privileges and immunities in the exercise of their functions outside their own country.

21. The judges and supplementary judges shall draw an annual salary to be fixed by the Council of the League of Nations.

22. After the termination of the judicial functions the judges shall be entitled to a pension on a scale to be fixed by the Council of the League of Nations.

23. The expenses of the Court shall be borne by the League of Nations.

24. The seat of the Court shall be at The Hague.

25. The Court shall have one session every year, which, unless otherwise provided by rule of Court, shall begin on the fifteenth of June and continue until the business before the Court is disposed of. The President shall have the power to convoke an extraordinary session of the Court when he deems it necessary.

26. There shall be present at the first hearing of a case not less than nine judges and, if there be less than this number available, their places shall be filled by supplementary judges called in rotation in the order of age. If, for any reason, any of the judges are unable to continue during the hearing, the remaining judges, provided there is a quorum of seven, can continue the case.

27. If, on the trial of a case, there is no judge upon the Court belonging to one of the litigating States, that State shall, for the purposes of the trial, appoint a judge who shall take part in the disposition of the case with equal rank with the other judges on the bench.

If neither of the parties in litigation before the Court has a judge, each shall appoint a judge to take part in the proceedings and the disposition of the case.

If two or more of the parties are in the same interest, they shall have but one judge, to be agreed upon between them.

28. The Court is open to all States who are members of the League of Nations and to States not members of the League who comply with the conditions laid down by the Council under Article 17 of the Covenant. The Court shall take cognizance only of suits between States, but the State may put forward rights which it claims on behalf of any of its citizens or for the nationals of another State on whose behalf it is entitled by treaty to appear.

29. The Permanent Court of International Justice is competent to deal with disputes between States concerning cases of a legal nature; that is to say, those dealing with:

(*a*) The interpretation of a treaty.
(*b*) Any point in international law.
(*c*) The proof of any fact, which, if established, would constitute a breach of an international contract.
(*d*) The extent or nature of reparation due for the breach of an international contract.
(*e*) The interpretation of a sentence passed by the Court.

Cases which, though they cannot be drawn up and decided according to strict law, are the subject of an agreement, between the parties, submitting them for decision by judicial means, are classified with cases of a legal nature, for the purpose of submission to jurisdiction.

In cases of a dispute on the decision whether a given case does or not fall within the classification of the preceding article, the Permanent Court will render an interlocutory decision.

30. When a case arises between two States under the provisions of Article 1, and after all diplomatic means of settling such dispute have been exhausted and it is not agreed to submit the case to a Court of Arbitration as defined in Article XIII of the Pact, the party alleging injury may submit the case to the Permanent Court.

If the other party refuses to submit the case to the Court, the Court decides in first instance if there exists an affirmative or negative engagement to submit to the Permanent Court the case in conformity with the provisions of Article XIV of the Pact.

All States signatories to the present act are considered as having agreed to submit to the Permanent Court all cases enumerated in Article I arising between two signatory States, unless it is already agreed to select a Court of Arbitration according to Article III.

31. The rules of law to be applied by the Court within the limits of its competence, hereinbefore described, for the settlement of international differences are as follows, in the order in which they are to be considered:

(1) Conventional international law, whether general or special, being rules expressly adopted by the States which are parties to a dispute;

(2) International custom, as evidence of a common practice of nations, accepted by them as law;

(3) The general principles of law recognized by civilized nations;

(4) The authority of judicial decisions and the opinions of the best qualified publicists of different nations as a means of application and development of law.

32. The Court may give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly of the League of Nations and may take jurisdiction in any question submitted to it, pursuant to the provisions of any treaty to which any member of the League of Nations is a party.

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[Figures in italics refer to article numbers of conventions, treaties, etc.]